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THE OMEN: *Three Affiliated Tribes v. Moe* AND THE FUTURE OF TRIBAL SELF-GOVERNMENT

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Although Congress' power in Indian affairs is said to be plenary[1] and its policy and wisdom unreviewable,[2] essential principles have grown more out of the gaps than the substance in federal legislation. Familiar and portentous phrases such as "guardianship" and "tribal sovereign immunity" are judicial constructions.[3] Only one federal statute addresses the general powers of tribes, and it simply incorporates by reference "all powers vested . . . by existing law," *i.e.*, federal common law.[4] Courts must often rely upon the application of standardized presumptions to resolve the most significant issues.[5]

Judicial interpretation and federal policy have developed more or less independently and inconsistently in the past thirty years. Congress appeared anxious to terminate reservations in the 'fifties, but the Supreme Court interpreted national policy to require that tribes retain certain inherent powers until actually expressly limited by statute.[6] In the 'sixties, Congress reversed its position on termination. Recent legislation such as the Indian Civil Rights Act[7] and Indian Self-Determination Act[8] seem to recognize that tribes are here to stay and serve important social and political functions. Now the Court is weakening its earlier stand on tribes' inherent sovereignty.

Judicial erosion of tribal sovereignty has not been deliberate. The Court lacks direction. Opinions are internally contradictory, inconsistent with one another, and often in conflict with political, historical, and economic facts. While the Court searches for guidance, tribal affairs are thrown into a dangerous state of uncertainty and vulnerability. The most recent manifestation of this process is *Three Affiliated Tribes v. Moe*,[9] which promises to further confuse the issues and will work serious economic hardships on tribes. It can only be understood against the background of the decisions that preceded it and the economic reality it misconstrued.

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I. *The Involution of a Legal Doctrine: The Infringement Test*

A Checkered History

Lawyers often speak of legal doctrines as "evolving." This evokes an image of adaptive improvement, and by analogy to biological evolution, a gradual process from generalization to specialization. Legal concepts do not always evolve in this sense. When a court is satisfied with the ramifications of a new rule, it entrenches it by means of selective extension to new cases: specialization, evolution. However, a court repentant of an earlier position and unwilling to repudiate the precedent openly may choose to weaken it, not merely by narrowing its application, but more importantly by *ambiguating* its application until it stands for everything and nothing at the same time. This is what I call "involution." The demise of the infringement test is an example of legal involution.

Prior to *Williams v. Lee*,[10] the Supreme Court avoided adoption of a single, principled basis for testing the limits of state power over tribal communities. Thee cornerstone of Indian law, *Worcester v. Georgia*[11] has been read for a doctrine of federal preemption of state law arising from the commerce, treaty, and supremacy clauses of the Constitution. It did not include the slightest hint that tribes were less sovereign than states within their own boundaries. Indeed, the author of the Court's opinion in *Worcester*, Chief Justice Marshall, had remarked in an earlier opinion that a non-Indian purchasing land from a tribe within its borders would be entirely subject to tribal law while residing there.[12]

From 1871 to 1934, the United States engaged in an aggressive policy of intervention in tribes' domestic affairs. Tribal governments were subjected to supervision, religious activities were suppressed, and children were coercively reeducated.[13] The courts could no longer without hypocrisy hold up *Worcester* as a source of exclusive federal authority over tribal affairs. According to *Worcester*, this authority arose from treaties, *i.e.*, voluntary cessions of power from tribes to the United States.[14] Because its coercive actions on reservations were not supported by treaties and were in fact often violently resisted, Congress needed some alternative theory of legitimacy.

The courts responded by reconceptualizing federal power as a function of its *purpose.* Reservations were no longer sovereign tribal homelands but schools for the civilization of the Indians.[15] Reservation programs putatively intended for the benefit of In-

dians were accordingly declared immune from state interference on a theory of *federal preemption.*[16] *Worcester* continued to be read for the principle that, as between the United States and the individual states, only the former had authority to dispose of Indians and their territory; but tribal consent was no longer to be a limitation on that authority.[17]

The federal purpose idea necessarily implied strict adherence to express congressional policy. Courts began to make references to Congress' "plenary power" over Indians, which they construed to mean extraordinary congressional discretion to make policy and lack of judicial authority to review it.[18] This did not exclude occasional judicial acquiescence in arrogation of power by the states to address problems not yet spoken to by federal law.

Such was the case in *United States v. McBratney*[19] and *United States v. Draper*,[20] decided while Congress was in the process of subdividing and abolishing many northwestern reservations. These two cases would play a peculiar role in the development of federal Indian law in the Warren Court. *McBratney* held that the courts of Colorado could entertain the prosecution of a non-Indian for the murder off another non-Indian within the boundaries of the Ute Reservation. The Court was impressed by the *absence* of a provision for "absolute [federal] jurisdiction and control" of Indian lands in Colorado's Enabling Act. "Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words."[21] The converse of *McBratney* is that states *with* such language in their enabling acts *lack* criminal jurisdiction over non-Indians' reservation activities. The "rule" was nothing more than a standardized, gap-filling presumption in favor of continued federal preemption.

Montana's Enabling Act included an "absolute jurisdiction and control" clause.[22] However, the subsequent General Allotment Act contemplated, as the *Draper* Court understood it, ultimate termination of all tribes.[23] This diffuse policy, the Court reasoned, superseded the express language of the Enabling Act. Once a reservation had actually been allotted, Congress retained under the "absolute jurisdiction and control clause" only those powers "essential to prevent any implication of the power of the State to frustrate the limitation imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment in severalty."[24] Under allotment, all reservation lands would ultimately be merged into state jurisdiction, hence, the states might reasonably enjoy some

measure of control during the transition. In a word, *Draper* reversed the presumption in *McBratney.* State power is to be presumed absent express federal language to the contrary.

The end of allotment in 1934 rendered *Draper* obsolete. It applied to a special set of facts that no longer existed. Moreover, the Indian Reorganization Act[25] recognized tribes as functioning political bodies, rebutting the contrary implication of prior laws. Nevertheless, the ramifications of reorganization have not, even at this time, been fully clarified. The proliferation of federally supervised tribal governments under the Act actually resulted in surprisingly little litigation for almost twenty-five years. Although lower federal courts had occasion from time to time to interpret the status of tribes,[26] the Supreme Court did not address that enigma directly until 1958.

When the Court did intervene, Congress was several years into its new policy of "termination."[27] Like allotment, termination contemplated ultimate absorption of tribes by the states. However, allotment involved a 25-year transitional process of subdivision, interpenetration by non-Indian landowners, and gradual phasing-out of federal supervision, in the kind of power vacuum that led Montana to assert jurisdiction in *Draper.* Termination was by contrast like the flicking off of a switch. Within a year to two years, the tribe and its property were relinquished to state control. The state either had control or it did not.[28] Termination was, moreover, originally intended by Congress to depend upon tribal consent. The absence of a provision for tribal consent in the law as passed prompted criticism from the President, opposition by tribes, and eventual amendment by Congress in 1968.[29]

The "Infringement Test" is Born

In *Williams v. Lee*[30] the Court frankly sought to synthesize the shifting and inconstant tide of Indian law, giving shape to the first general principle of tribal jurisdiction and powers to emerge since John Marshall's time. The dispute was between a non-Indian creditor doing business on the Navajo Reservation and his Navajo debtors, who resisted a state civil action for recovery of the debt. The Supreme Court of Arizona ruled that the states' power over reservations is limited only by Congress' express statutory prohibitions.[31] This amounted to a presumption in favor of the legitimacy of state power.

Writing for the Court, Justice Black concluded that "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation,"

citing the Indian Reorganization Act and Trade and Intercourse Act[32] as examples of congressional provision for exclusively federal and tribal regulation. Black interpreted termination legislation as evidence that "when Congress has wished the States to exercise this power it has *expressly* granted them the jurisdiction."[33] He also observed that the Navajos entered into a treaty with the United States in 1868 and that "[i]mplicit in these treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[34] President Truman had vetoed a bill to extend state jurisdiction over the Navajos in 1949,[35] and the tribal government had received substantial assistance from Congress to expand its activities.

At the same time, Black was not prepared to fashion any rule potentially inconsistent with continuing federal intervention in the Navajos' affairs. He conceded that Congress had power to subject the Navajos to state jurisdiction against their will.[36] Nor did he imagine Congress' long-range policy for tribes to be anything less than completely assimilationist.

> Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them.[37]

Thus the goal was to dissolve tribal governments, but only when the Indians were deemed adequately prepared for the responsibilities of state citizenship and prosperous enough to prevent economic hardship to the states. The Court merely believed it to be Congress' intention that it have exclusive control over this transaction.

Black deftly rationalized the apparent inconsistencies among the Court's prior decisions. Discussing the *Worcester* rule of exclusive tribal sovereignty subject only to treaties with the United States, he argued that "[o]ver the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . ,"[38] as in according Indians the right to bring suit in state courts. However, this right goes to the states' lack of power to discriminate upon the basis of race, not their power to act extraterritorially.[39] In support of his theory, Black also invoked nineteenth-century decisions such as *Draper* that actually relied on federal *delegations* of power to states under defunct laws.[40]

Black's citations were inaccurate, inapplicable, or misconstrued. His oft-quoted rule that, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them,"[41] was his own invention, albeit more or less consistent with the *results* of prior federal decisions. It had never before appeared as the rule of a case. In fact, Black himself had stated the opposite rule in dictum twelve years earlier in *New York ex rel. Ray v. Martin.*[42]

Jurisdictional disputes between tribes and states go to the nature of the reservation boundary line. States always argued that the boundary was nothing more than a demarcation of Indian ownership; tribes accorded it deep political significance. Rather than resolve this controversy one way or the other, Black's infringement test waffled, declaring the boundary political for some purposes, merely proprietary for others. It therefore implied a certain theory of the origin and purpose of reservations. Black apparently assumed that tribal lands are not reservations of original sovereign territory but were acquired from and remain a "part" of the states.[43]

"Infringement" characterizes tribal jurisdiction as governed by subject matter, not territory. Territory is a difficult enough rule to apply in resolving multi-state jurisdictional conflicts in a mobile society. Without precise enumeration, subject matter is even more difficult to apply. Anything that a state does, on *or off* a reservation, will affect that reservation to a greater or lesser extent. The state and reservation economies are inextricably linked, and there is considerable transiency across their common border. State action will always present problems of degree rather than kind.

The infringement test is internally inconsistent and politically paradoxical. When it authorizes a state action, is the Court really saying it will have no adverse impact upon the tribe? Why, then, did the tribe complain in the first place? Barring some extraordinary ignorance on the part of the adversaries, the theory of the remedy is completely at war with the very existence of a dispute. A court cannot please everyone by means of the cute fiction that it will uphold that party whose claim is not adverse to the other's.

The states have always maintained the importance of territoriality. No state would accept the power of others to govern its citizens wherever they should go, least of all the sister states of the Atlantic megalopolis whose work-week populations consist substantially of out-of-staters. The ability of a state to maintain a uniform set of environmental conditions, risks, and opportunities consistent with its public policy declines in proportion to the

number of persons and value of property within its territory that it cannot fully control. All of the states must operate under the aegis of uniform concurrent federal laws, but requiring them to accept concurrency with forty-nine other states as well would be considered provocative in the extreme.

The states would therefore consider a change from territorial to subject matter jurisdiction a loss of sovereignty, yet they maintain, and the Court agrees, that such a change has no adverse effect on tribes. There are only two ways to reconcile this apparent contradiction in principle. It might be advanced that the loss of sovereignty involved is *de minimis* for tribes because they, unlike states, have in the past exercised relatively little control over their territory, and little or none over non-Indian residents. This, however, ignores the possibility that tribes may have reason to increase their control in the future; many have already begun to do so. If *Williams* is to be read as a kind of tribal preemption rule, then, by analogy with the general federal preemption rule, tribal inaction does not necessarily authorize state action, and state action to fill a void is ousted by subsequent tribal legislation.

It might also be argued that tribes lacked territorial jurisdiction originally, and are mere associations of individuals, so that they have lost nothing. *Johnson v. M'Intosh* held that tribes do not have title to the soil, but merely a kind of possession, title being in the United States or the states.[44] However, this was simply a fiction of convenience to dispose of conflicting federal patents and tribal land grants and preserve the monopoly of the federal Land Office. *Worcester* unambiguously contemplated territorial jurisdiction and was decided by the same bench a decade later.

There remains, finally, the enigma of that phrase, "[a]bsent governing Acts of Congress." How specific must an act be to be "governing?" Was *Williams* itself a case of "infringement," or was it "governed" by the Navajo Treaty, Navajo-Hopi Rehabilitation Act, and other general federal laws Black discussed at length? As none of Black's citations specifically recognize a power in the Navajo Tribe to exercise exclusive civil jurisdiction over members, one of two conclusions must be drawn. Either they are immaterial to the case, or else Black had in mind that these general laws *preempt state jurisdiction generally.* If the Navajo-Hopi Rehabilitation Act, which only recognizes that tribe's exercise of powers vested "by existing law," is sufficiently "governing" to cover a non-Indian's action for an Indian's debt, then the Indian Reorganization Act must be at least equally "governing" of the nearly two hundred tribes it covers. I.R.A. also refers to tribal powers vested "by existing law" without further specification.

Following *Williams*, it must have been anticipated that the Court would move swiftly and decisively to give definite shape and texture to its new doctrine, lest it actually result in aggravating the uncertainties left by prior law. On the contrary, the Court did not use the infringement test for fifteen years. In the meantime it followed an odyssey through various alternative and inconsistent rules, always citing *Williams* as if it somehow provided a common conceptual thread. The Court became increasingly preoccupied with the background details of each case without relating them back to general principles.

The Alaskan Connection: "Infringement" Exalted

In 1962 the companion cases of *Metlakatla Indian Community v. Egan*[45] and *Kake v. Egan*[46] posed some new historical and political problems. The Court responded with confusion, and the involution of the infringement test began. *Metlakatla* and *Kake* both involved attempts by the state of Alaska to prevent the use of fish traps by Alaskan natives. Natives had always used traps, which are, for anadromous fish stocks, the most efficient harvest technology and afford the trapper considerable cost advantages in the wholesale market.[47] Unfortunately, marine fishermen have often prevailed upon state legislatures to prohibit trapping as a conservation measure, the underlying motivation being to eliminate the trappers' ability to undersell marine fishermen to fish processors.[48]

The Annette Islands Reserve was established by an act of Congress. In 1916, it was extended three thousand feet to sea by presidential proclamation in connection with a federally sponsored tribal cannery development.[49] Both the Act and proclamation expressly authorized federal regulation of the fishery. The Secretary of the Interior authorized the Metlakatlans to operate fish traps within the reserve, and trapping continued to be authorized after passage of the Alaska Anti-Fish Trap Conservation Law in 1959, notwithstanding state threats to enforce the law against the natives.[50] Metlakatla brought suit for an injunction against state interference with its traps, raising as alternative grounds for decision lack of state jurisdiction over Indian reservations and lack of state power over federal instrumentalities.

Although he took pains to distinguish Alaskans generally from other native Americans,[51] Justice Frankfurter described Metlakatla as uniquely similar to reservations in the lower 48 states.[52] The Act

creating the Annette Islands Reserve, he pointed out, specified that the Metlakatlans were to use and enjoy it subject to federal regulations, and to form a tribal government under federal supervision.[53] He found no evidence that either Congress or the Executive had ever departed from the original policy of preserving an exclusively tribal and preemptively federally regulated fishery in the Annette Islands, and noted that subsequent general laws such as the Alaska Statehood Act expressly reserved "absolute" federal control of prior statutory native fishing rights.[54] Frankfurter could find only one flaw. The Secretary of the Interior issued the Metlakatla fishing regulations under the authority of the Alaska Statehood Act, not the Act and proclamation creating the Annette Islands Reserve. Accordingly, the case was remanded with the expectation that the Secretary would issue the same or new regulations citing the proper authority.[55]

Judging from his discussion of the federal legislative record, Frankfurter had no doubts that the Metlakatlans were entitled to their traps purely as a matter of statutory construction. At no point did he rely on infringement or consider what law might apply "absent governing Acts of Congress."

Kake was a challenge to the same Alaska Anti-Fish Trap Conservation Law brought by the Organized Village of Kake and the Angoon Community Association, both I.R.A. tribes.[56] Like Metlakatla, both were dependent upon salmon fishing, traditionally fished with traps, and had received federal assistance to build canneries some time before Alaska became a state. Unlike Metlakatla, neither occupied a federal reservation. The traps were operated in the Tongass National Forest and were originally authorized by the Forest Service and Army Corps of Engineers. In 1959, the Secretary of the Interior issued regulations for the licensing of these traps purportedly under authority of the Alaska Statehood Act.

The Secretary had no *specific* statutory authority to issue these regulations, as he had under the 1891 Act in the case of Metlakatla,[57] and Frankfurter read the general language of the Statehood Act, reserving to the United States "absolute jurisdiction and control" of Indian fishing, to "not give powers of the nature claimed" by the Secretary.[58] Based entirely on a few statements made during the House hearings on Alaskan statehood, he concluded that the Statehood Act merely "preserve[d] the status quo" pending some future and final determination of native claims.[59] "The disclaimer was intended to preserve unimpaired the right of any Indian claimant to assert his

claim . . . against the Government," and nothing more.[60] If this were the case, why didn't Congress simply say so, instead of referring to "jurisdiction and control?"

Frankfurter admitted that the "absolute jurisdiction and control" language of the Act received little attention in Congress."[61] There was strong opposition in the Senate to any provision depriving Alaska of police power over Alaskan native areas.[62] The obvious expedient would have been to adopt language in the Act different from the acts already adopted for the lower 48 states. The Senate's bill accordingly deleted the "jurisdiction" provision, but the House bill retained it. In conference, the House text was adopted, with one opposition senator (Jackson) expressing himself reasonably confident that the two bills would have the identical effect.

Frankfurter's use of this history asks us to accept two peculiar principles of interpreting legislative history: that a political victory should be construed against the successful party, and that a single senator's legal interpretation of an act is representative of the intent of Congress as a whole. The texts of the House and Senate bills differed sufficiently to force the matter into conference. This time-consuming process is not undertaken lightly by Congress; it cannot be concluded from the adoption of the House text that a majority of Congress was indifferent between the two bills, only that opposition to the House text was weaker than opposition to the Senate text.

Ten statehood acts, including Arizona's, included similar language.[63] If "absolute jurisdiction and control" preempted all state jurisdiction, then why, Frankfurter asked, had the Court not so construed Arizona's Enabling Act in *Williams v. Lee*? Instead of depriving Arizona of jurisdiction outright, he reasoned, the Court had proceeded by balancing the assertion of state power against its impact on tribal self-government, indicating that "'absolute' federal jurisdiction is not invariably exclusive jurisdiction."[64] It is unnecessary to criticize this as semantic nonsense. The Arizona Enabling Act was never an issue in *Williams*.[65]

Frankfurter attributed his rule to *Draper* which, as we have seen, construed Montana's Enabling Act in the context of the allotment policy. The 1934 Indian Reorganization Act repudiated allotment—a fact of which Frankfurter was fully aware[66]—rendering *Draper* obsolete. Moreover, Alaskan reservations were never subject to allotment.

Frankfurter argued that it was Congress' policy to increase state

power over tribes, citing Sections 231 and 452 of Title 25 of the United States Code. He described Section 231 as authorizing state officers to enforce sanitation, health, and compulsory education laws within reservations.[67] In fact, the state must first obtain tribal consent, if the tribe has a governing body.[68] Similarly, Section 452 merely authorizes the Secretary of the Interior "in his discretion" to contract with the states to administer federally funded Indian programs; it confers no police powers on them.[69]

Frankfurter's trump, however, was termination, still in its heyday. These laws, he suggested, recreated the transitional situation of *Draper* and required a presumption against broad tribal powers. Frankfurter conveniently neglected to quote Section 2(b) of Public Law 280, which states that "[n]othing in this section [conferring criminal jurisdiction on the named states] shall . . . deprive any Indian or Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal Treaty, agreement, or statute with respect to . . . fishing *or the control, licensing, or regulation thereof.*"[70] Instead he paraphrased it as "disclaim[ing] the intention to permit States to interfere with federally granted fishing privileges,"[71] which is quite another matter. The law itself unambiguously establishes exclusive federal jurisdiction of previously recognized fisheries. Frankfurter's paraphrasing of it implies that the state may regulate these fisheries if in so doing it does not "interfere" with them, which is a relative judgment. Evidently he hoped to square his interpretation of the statutes with the infringement test, missing the point that infringement applies only governing Acts "*absent* of Congress."[72]

Even if infringement were the proper standard, Frankfurter's analysis left much to be desired. Without facts or precedent, he asserted that "state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee.*"[73] But the tribe and its government were supported by the traps, and the kind of gear used in harvesting salmon necessarily determines the size and unit cost of the harvest. Any limitation on gear choice must affect the realizable value of the fishery. A prohibition against trapping, the most efficient technology, reduces resource value as surely as a direct tax or confiscation. Of course, state regulation also ousts the power of the tribe to adopt inconsistent regulations, a direct infringement of tribal self-government.[74]

Frankfurter gave the statutory context only passing mention.[75] The main thrust of his opinion was different: even if the saving clauses in the Statehood Act and Public Law 280 did apply to

Kake and Angoon, they did not mean what they said because there was no infringement.

This implied a rule, entirely unnecessary to dispose of the case, that infringement limits the meaning of express federal legislation. Is the Court competent to modify acts of Congress in accordance with its own sense of policy? Infringement began as a gap-filling rule where Congress had not spoken, giving the benefit of the doubt to tribes consistent with what the Court conceived to be overall federal policy. In *Kake* infringement became a standard of policy superior even to Congress, taking away rights already expressly granted to tribes.[76]

Justice Black Again at the Helm: Infringement Avoided

With the case of *Warren Trading Post v. Arizona Tax Commission*,[77] stewardship of the Court's conceptualization of tribalstatus returned to Justice Black, author of *Williams.* The appellant sought immunity from an Arizona gross income tax on the alternative grounds of preemptive federal regulation of licensed traders on the Navajo Reservation, and preemptive federal regulation of commerce with Indian tribes generally. The real significance of the case is diminished considerably by the fact that the Court limited itself to the narrower of these two arguments, refusing to consider the jurisdictional status of businesses as a whole located within tribal territories.[78]

Observing, as he had in *Williams*, that "from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference,"[79] Black remarked on the degree to which Congress had nonetheless exercised control over the activities of non-Indians entering tribal areas for the purpose of trade.[80] Special regulations had been adopted by the Department of the Interior for licensing traders to the Navajo, Hopi, and Zuni.[81] "These apparently all-inclusive regulations . . . would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders."[82]

This narrow ruling, entirely consistent with the main body of law on federal preemption under the commerce clause,[83] would have adequately disposed of the case. Black nevertheless opined on the *purpose* of the federal preemption of Indian trading.[84] There was, he concluded, an "evident congressional purpose of

ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations . . . in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner."[85] He also considered it relevant that "federal legislation has left the State with no duties or responsibilities respecting the reservation Indians,"[86] implying that the equities lay against any state power to tax reservation wealth.

Warren left a great deal unsaid. Was the tax invalid because the regulation of Indian traders generally had been preempted by Congress, or only because the effect would have been to increase prices paid by Indian consumers? Black carefully avoided answering this question by limiting his discussion to taxes on sales made to Indians. Under a narrow purpose rule, taxes on sales to non-Indians would have to be upheld. Under a more general preemption rule applying subject matter criteria, the tax on non-Indians would be invalid. Black's opinion also left open the possibility that states' contribution to Indians' welfare would be considered an equity in favor of state taxation, when and if the states provided services to reservations.

A Court Divided: Infringement Distinguished

Black avoided discussion of infringement as such in *Warren.* He neither rebuffed nor endorsed Frankfurter's expansive interpretation of that rule in *Kake.* Tribes' residual powers were simply not in issue. In *McClanahan v. Arizona Tax Commission,*[87] Justice Marshall revived infringement only to completely confuse its source and meaning.

From the outset Marshall characterized Indians as "residents within the borders" of the states, implying that tribal sovereignty is an exception to a *presumption in favor of state power.* "This case requires us once again to reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations."[88] But this depends upon our definition of state territory. If perchance a state had been created within the exterior boundaries of another state, could the greater state assert plenary power over the smaller? The distinction between exterior boundaries and territory has no place in interstate disputes only because no state encloses another. Reservations, however, do pose this problem. Reference merely to the more-inclusive boundary results in absurdity. If the Yakima Reservation, which is entirely within the exterior boun-

daries of Washington, is part of Washington State territory, then the parcels of Arizona, New Mexico, and Utah enclosed by the Navajo Tribe's exterior boundaries must be a part of that tribe's territory.

It is significant that the plaintiff in this case *conceded* she was a resident of Arizona.[89] The Court was not, therefore, called upon to determine whether a reservation is a part of the corpus of a surrounding state, but only whether a reservation that is *admitted* to be part of a state may nevertheless enjoy *exceptions* to that state's plenary power. This is similar to the position taken by Justice Frankfurter in *Kake* but, ironically, Marshall described *Kake* as applicable only to Alaskan communities not "possess[ing] the usual accoutrements of tribal self-government."[90]

The Court was finally in a position to reconcile *Williams, Kake,* and *Warren.* Unfortunately, Marshall confused the situation further by reading *Warren* as a tribal sovereignty case[91] rather than as a federal preemption case.[92] *Williams* and *Warren* refer to infringement of tribal or federal *government,* respectively. In *McClanahan* the tax was on individual income. Rather than draw the economically appropriate conclusion that a tax on individuals within a government's jurisdiction potentially impairs that government's ability to raise its own taxes, Marshall re-read *Warren* as a case dealing with state power to regulate *private* reservation activities *generally.*[93] Of course, the trading post in *Warren* was a private activity, but it was also an exclusively *federally regulated* private activity. The determinative fact was the status of the regulator, not the status of the regulated object.

The confusion deepened as Marshall proceeded to cite nineteenth-century cases authorizing state regulation of non-Indians within reservations.[94] If these cases remain valid, a tribe's powers cannot be territorial and sovereign, but only personal, like that of a private association. Although no treaties or statutes of the United States expressly forbid tribes to exercise complete territorial powers, during the allotment period courts assumed the *purpose* of reservations was to swiftly advance the Indians' civilization. Therefore, the existence of a reservation could have no bearing on nonIndians unless their activities interfered with the Indians' progress. Similarly, some courts reasoned that self-supporting, off-reservation Indians lost their protected status because they had transcended the need for federal supervision, not because they had physically left the tribe's territory.[95] But this line of reasoning should have dissipated when Congress recognized tribal self-government in 1934. It should certainly have been re-

jected by Marshall in 1973, five years after Congress repudiated its "termination" policy.

Marshall seemed to have difficulty keeping his theories straight. At one point he argued that the principle of residual tribal sovereignty retains vitality in the law. "[I]t would vastly oversimplify the problem to say that nothing remains of the notion that reservation Indians are a separate people to whom state jurisdiction, and therefore state tax legislation, may not extend."[96] Later, he argued that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption," characterizing the history of tribal self-government as a mere "backdrop": "The modern cases thus tend to avoid reliance on *Platonic notions of Indian sovereignty* and to look instead to the applicable treaties and statutes which define the limits of state power."[97] Nor was Marshall denying the existence of the "infringement test" so much as he was suggesting that it applied to increasingly fewer cases. "The question [of residual tribal sovereignty] is generally of little more than theoretical importance, however, since in almost all cases, federal treaties and statutes define the boundaries of federal and state jurisdiction."[98]

Were the remaining gaps in legislation really so few and narrow? There was neither congressional authorization of state taxation, nor express congressional immunization of Indian income from taxation, in *McClanahan* itself. The infringement test could have been applied. Instead, Marshall proceeded to resurrect the rule of *Carpenter v. Shaw,* a pre-Indian Reorganization Act case, that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."[99] He proposed that in the *absence* of specific federal laws, *Carpenter* requires a presumption in the tribe's favor.[100] He declined to discuss whether Arizona's tax infringed upon Navajo self-government.

Black's statement of the infringement test in *Williams* used the words, "infring[e] upon the right of reservation Indians to make their own laws."[101] But *Williams* did not involve direct interference with a tribe. There was no showing in that case that the Navajo Tribe had laws for the collection of debts, courts to apply them, or jurisdiction of both the parties. There was no evidence that Arizona debtor law conflicted with any specific Navajo ordinances. The case can only be understood as denying the power of a state to preempt a tribe's legislative *jurisdiction,* its power to make laws, not the specific laws it may have already made.

Marshall could have argued that Arizona's income tax subtracted from the Navajo Tribe's tax base, limiting the tribe's potential tax yield, and redistributing the Indians' income without regard to tribal policy. It would be irrelevant whether the tribe itself levied a tax, as it had power to tax and might tax at some future time. Moreover, not taxing is as much a matter of public policy as taxing, as the myriad exemptions in the federal tax system illustrate.

Marshall failed, however, to reconcile *Williams* and *McClanahan.* Instead, he concluded by distinguishing them. "To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation *confers individual rights.*"[102] Arizona's tax infringed upon Rosalind McClanahan's "rights as a reservation Indian," *not* the political rights of her tribe. This innovation, unsupported by any citation, should have sent a shock wave through Indian law circles. Its significance is devastating. By this reasoning, the race, not the residence of the taxpayer, may be the determinative factor.

Marshall seemed to be groping for a two-tiered test that both incorporated and distinguished infringement, arguing that *Williams* and cases like it "have dealt principally with situations involving non-Indians" in which both the state and tribe have an interest.[103] By implication, if the state has an interest in the controversy, the Court will be more amenable to upholding state jurisdiction.[104]

Elsewhere in his opinion, as we have seen, Marshall appeared to think that *Williams* applied to interference with tribes, *Carpenter* to interference with individuals. In addition, his opening remarks regarding Indians being residents of the state implied the opposite of *Carpenter, i.e.,* that states may penetrate reservations unless Congress expressly forbids it. Evidently he had no clear picture of the applicable law and was experimenting with possible solutions. The Court's reasoning in the companion case, *Mescalero Apache Tribe v. Jones,*[105] is instructive of its lack of real commitment to any principle. *Mescalero* involved state taxation of a tribally owned business located off the reservation.

Unlike *McClanahan, Williams,* and *Warren, Mescalero* divided the Court. Justice White wrote for the majority, with Brennan, Stewart, and Douglas dissenting. Justice Marshall, author of the accompanying *McClanahan* opinion, was surprisingly silent. Obviously the Court was confused, as the lack of structure in *McClanahan* suggested notwithstanding its unanimity.

Mescalero has been sometimes erroneously read for a distinc-

tion between on-reservation and off-reservation tribal trust lands. Federal law authorizes the Secretary of the Interior to acquire lands "in trust" for tribes[106] and to extend reservation boundaries.[107] In fact, the land at issue in *Mescalero* was merely leased by the tribe from the United States Forest Service.[108] It was neither trust nor reservation land. Justice White summarily rejected the tribe's claim that its activities were those of a federal instrumentality subject to exclusive, preemptive federal control wherever they are conducted. He did not actually arrive at this conclusion by argument, but simply repeated Marshall's observation in *McClanahan* that questions of Indian law require "individualized treatment of particular treaties and specific federal statutes."[109] He, too, hid behind the fiction of statutory interpretation in a case in which there were no relevant statutes, declining to provide any principled basis for his decision.

White criticized the "theory... that a federal instrumentality was involved and that the tax would interfere with the Government's realizing the maximum return for its wards" as a historical relic of little remaining significance.[110] He produced little if any sound authority for this generalization, citing two Oklahoma and one Wyoming tax decisions Justice Marshall distinguished the same day in *McClanahan* as inapplicable to communities which "possess the usual accoutrements of tribal self-government."[111] For some reason he also thought it important that individual Indians become subject to state law when they leave the reservation;[112] but the fact that a state's citizens become subject to other states' laws when they travel abroad is entirely consistent with the complete territorial sovereignty of each state.

I have no quarrel, however, with the result. The federal instrumentality idea is hostile to tribal self-government because it limits lawful tribal activities to those that serve federal objectives. There is no reason why tribes should strive to have more *extraterritorial* sovereignty than the states enjoy, if it means advancing a theory inconsistent with tribes' enjoyment of as much *domestic* authority as the states.

The result is also consistent with general constitutional tax law. As White observed, quoting from one of the Court's earlier decisions, the "mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation."[113] Early in this century the Court began to appreciate Thomas Jefferson's fear that house-that-Jack-built arguments would be used to extend federal power indefinitely. "Theoretically," the Court remarked in *Group No. 1 Oil Corp.*

v. Bass, a case involving sales of government lands, "any tax imposed on the buyer with respect to the purchased property may have some effect on the price, and thus remotely and indirectly affect the selling government," but this should not extend an intergovernmental immunity through the entire chain of distribution.[114] Increasingly, federal courts in non-Indian tax cases have limited intergovernmental immunities to the activities of public agencies themselves.[115]

Justice White advanced the legislative history of the Indian Reorganization Act as evidence of Congress' intent to free, rather than further entangle tribes in the federal bureaucracy.[116] Recognition of tribal governments as politically distinct from the Bureau of Indian Affairs was one argument advanced in the Act's favor by the Bureau itself.[117] However, even if Congress did not intend tribes to stand in the shoes of the United States *vis-a-vis* the states, we are no farther along in the search for some other principle determinative of the tribe-state boundary.

White's blanket dismissal of the instrumentality idea is nevertheless hard to square with the facts. In *Warren,* Justice Black argued from the existence of numerous statutes and regulations governing the activities of reservation traders that Congress had preempted the field. Far more statutes and regulations govern the activities of tribal governments. In fact, *most* of the applicable title of the *Code of Federal Regulations* deals with tribal use of property, the activity being taxed in *Mescalero.*[118] Everything relating to licensed traders falls within a subpart of a subchapter.[119]

Any reasonable view of the circumstances leads to the conclusion that tribally owned business enterprises are more heavily regulated by the Bureau of Indian Affairs than licensed traders. Tribes must obtain approval for leasing and contracting, and for the expenditure of the profits; the traders in *Warren* merely had to obtain a discretionary license and avoid selling certain articles such as liquor on their premises. In fact, the Tenth Circuit had already ruled that federal supervision of tribal business activities constitutes "major federal action" within the meaning of the National Environmental Policy Act.[120]

The entire discussion of tribes' general intergovernmental immunities was, however, pure dictum. White accepted the United States' argument, *amicus curiae,* that the formality of taking the lease in trust for the tribe would have been "meaningless" because the United States already owned the land. Is any lease of federal land to a tribe therefore automatically trust land, even if the Secretary of the Interior never processes it in accordance with the applicable statute?[121]

Trust "land" is expressly exempted from state taxation by statute.[122] The New Mexico taxes complained of were levied on income and the use of personalty. Accordingly, Justice White turned to the question of whether a tax on income earned on a tract of land is a tax on the land itself.

A state resident's out-of-state realty cannot ordinarily be taxed by his state, but his income, including income earned on or proceeds from his out-of-state realty, can be taxed.[123] This rule avoids extra-territorial tax sales in violation of the much esteemed exclusive authority of each state over its own territory, without significantly impairing the power of each state to tax its own citizens' wealth whereever deposited.

The Supreme Court had previously upheld federal taxation of Indians' incomes, including the proceeds of trust lands. Oil royalties[124] and per capita shares in mineral development[125] on trust lands, individual and tribal, are subject to federal income taxation. However, capital gains taxes do not apply to liquidation of timber on trust land on the principle that to do so would amount to a tax on the value of the land itself.[126] It comes too close to federal taxation of a federally protected right, *i.e.,* a conflict between Indian policy and revenue policy. Justice White concluded that in the absence of language to the contrary in any federal statute, it should be presumed that income earned on trust land does not share the immunity of land itself.

There are several serious difficulties with this reasoning. The existence of a power in the United States does not imply the existence of an identical power in the states. There is a certain paradox in any rule that permits the United States to tax its own "wards" more extensively than the states can. On the other hand, there is a certain rationality to federal *preemption* of taxation to preserve the "guardian's" discretion over how and when Indians will be taxed because taxes do affect behavior.[127]

A consideration of the economics of taxation should engender some additional skepticism. An ad valorem tax such as an income, use, or property tax, is engineered on a "deepest pocket" principle. The eternal quandary in ad valorem taxation is determining which citizens are actually the wealthiest. The Constitutional Convention debated for days in 1786 over whether land, personalty, expenditures, or general income was the best measure of a man's wealth.[128] Every tax reform proposal meets similar criticism. It has always rested within the sovereign discretion of the state legislatures to resolve this for their own purposes, but when a federal program is at stake, it may be necessary to review state tax policy independently.

In the context of deepest-pocket economics, the question of policy is whether the value of the land (in the capital gains sense) or the annual income accruing on it (or cash flow) best estimates the ability of the owner to pay the tax. In many states, certain property tax exemptions are justified in that the elderly may have accumulated valuable estates, but actually earn little income. Elsewhere, property taxes are justified to the exclusion of income taxes on the theory that the wealthier invest in land and enjoy capital gains, so that an income tax falls heaviest on wage-earners. In any event, the wealth of the owner is not exempt at all. The level or degree of the tax, however, may be greater or smaller depending upon what manifestations of wealth are evaluated for tax purposes.

The tax exemption applicable to trust lands embodies an entirely different theory, *i.e.,* to *subsidize economic development* through tax immunization, rather than to raise revenue. A tax on the proceeds of land depresses the income and savings rate of the owner/operator as surely as a tax on the value of the land itself. An income tax tends to chill development just as much as a simple ad valorem property tax, based upon current rather than developable value. If Congress in 1934 had contemplated the possibility of future state income taxes, it might have been more explicit about income taxation in the economic development provisions of the Indian Reorganization Act.[129]

In *Squire v. Capoeman,*[130] the Court immunized trust allotment proceeds from federal capital gains taxation, reasoning that because the sale of timber from the land was its principal development value, taxation of timber sales would effectively take back the only thing the United States had given the allottee to develop. Of course, federal taxation of the seller's income has the same effect to a greater or lesser extent; it is merely computed on a different basis and at a different rate. If the Court in *Squire* had been truly concerned about maximizing the value of the allotment, it should have treated sales and income taxes identically.[131]

Douglas' dissent argued that the same rules of taxability should govern both on and off-reservation enterprises. "There is no magic in the word 'reservation.'"[132] In support, he cited a number of cases holding that the federal government has power to enforce Indian protective legislation off-reservation, on trust land, and indeed even on state lands.[133]

The majority did *not* suggest, however, that any such distinction exists as far as tax immunity is concerned; it read the relevant federal statute to be equally applicable to on and off-reservation

lands.[134] If anything, Justice White's *failure* to make such a distinction was his greatest error. In so doing, he left open the possibility of construing *Mescalero* to afford businesses no greater immunity from state regulation *within* the territory and jurisdiction of a tribal government than the tribe itself enjoys outside of its territory.

More than their immediate tax consequences, *McClanahan* and *Mescalero* agreed that each tribe-state relationship is to be determined as an independent question of fact. If there are no general "platonic" notions of tribal sovereignty, but merely the applicable treaties and statutes, the way is opened for distinguishing the status of each of some two hundred tribes. The legal costs and uncertainties necessarily resulting from the adoption of that rule necessarily chill reservation development.

The Blue Bull Bar and the Reservation That Isn't: Territoriality Appears and Just as Surely Vanishes

What had happened to infringement, preemption, and the rule of *Carpenter v. Shaw*? the dissent asked in *Mescalero.*[135] It was one thing to treat each case as unique on its facts, but quite another to hop willy-nilly from one legal gap-filling rule to another. Judicial Indian policy was taking on the same inconsistent quality as legislative Indian policy, which one congressman described as "having all of the energy, direction and purpose of a pup chasing its tail."[136] The process of rule proliferation and involution continued nonetheless.

United States v. Mazurie [137] involved due process challenges to a federal statute governing sales of liquor in "Indian country." The independent authority of the tribe itself was not in issue, only whether Congress had constitutionally delegated to it the power to license liquor retailers. However, the Tenth Circuit ventured in dictum to discuss tribal powers generally, and a unanimous Supreme Court, by Justice Rehnquist, answered them, in more dictum. It all resulted in a fleeting conceit on the part of some tribes and their attorneys that the confused undertones of *McClanahan* and *Mescalero* were about to give way to broad, positive principles.

The Mazuries operated the Blue Bull Bar on ten acres of fee land at Fort Washakie, within the borders of the Wind River Reservation. About one-fifth of the reservation is owned in fee, creating a characteristic checkerboard pattern.[138] Federal law prohibits the sale of liquor in Indian country, which is defined as including "all

land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent," except "fee-patented lands in *non-Indian communities,*" or where the tribe itself has adopted licensing regulations not inconsistent with state law and approved by the Secretary of the Interior.[139] Wind River adopted an appropriate licensing ordinance and the Mazuries failed to obtain a license. Resisting criminal prosecution by the United States, the Mazuries argued that the phrase "non-Indian communities" is unconstitutionally vague, and that Congress cannot delegate federal police powers to an Indian tribe.

The Tenth Circuit complained, "There is no standard provided as to what percentage of Indians or non-Indians is contemplated. Thus, if a given area can be selected as a 'community,' the statute does not indicate . . . what the community is if there are a greater or lesser comparative number of Indians." [140] If the statute contained "no reasonably ascertainable standards," where did that leave the Mazuries? Their only defense was their claim to be located in a "non-Indian community," which the trial court denied. If an exception to a general rule is unconstitutionally vague, the exception alone is struck out.

To avoid this result, the Tenth Circuit argued that the vague exception poisoned the entire rule. Without the general rule, however, there would be no federal jurisdiction at all within the Wind River Reservation except on federally owned lands. Instead of being territorial, federal police powers would extend only to the "checkers" of land in trust status.

In *Seymour v. Superintendent,*[141] Washington State argued that the inclusion of fee lands in the statutory definition of "Indian country" was intended to be limited to *Indian-owned* fee lands. For a unanimous Court, Justice Black summarily disposed of this claim as unsubstantiated by legislative history. In addition, Black observed that "checkerboarding" leads to chaos in law enforcement, suggesting a presumption against construing any statute to have that effect.

According to the Tenth Circuit, the facts in *Mazurie* were different. Tribal and state officers on Wind River were cross-deputized, and the boundaries of non-Indian-owned fee lands were well known, so that no deterioration of law enforcement could be expected to follow from "checkerboard" jurisdiction.[142] But *Seymour* was not based on Black's observation that checkerboarding is bad policy. The statute was unambiguous, and there was nothing in its legislative history to impugn its apparent directions.[143]

Any standard of jurisdiction based upon demography is dangerous. Power becomes a function of a transient phenomenon, and one which, even if objectified, as by use of census data, is not readily ascertainable by most persons. Moreover, the in-migration of non-Indians would be sufficient to overthrow a tribal government's legitimacy. Tribes would face an impossible choice: to exclude non-Indians from the reservation and thereby frustrate commerce and industry, or admit them freely and accept gradual loss of self-governing powers.[144]

The Supreme Court found no merit in the Tenth Circuit's vagueness arguments. After reviewing the record, Justice Rehnquist concluded that, "[g]iven the nature of The Blue Bull's location and surrounding population, the statute was sufficient to advise the Mazuries that their bar was not excepted from tribal regulation by virtue of being located in a non-Indian community."[145] However, he did not suggest what it was in the record that he found persuasive—evidence that the standard is indeed too vague.

Rehnquist took more seriously the Mazuries' contention that the United States lacks power to delegate regulatory authority to Indian tribes. The Tenth Circuit concluded that "[t]here is no theory of sovereignty or governmental subdivision which would support such a delegation,"[146] and suggested a broad and innovative theory of tribal status:

> The tribes have the usual powers of an owner of land, to the extent of such ownership, over those using their lands. This power is often confused with some elements of sovereignty when large tracts are involved, and when only the relationship between a Tribe and the Government is examined.[147]

It characterized Wind River as merely a "voluntary association, which is obviously not a governmental agency" and therefore unable to accept a delegation of power from Congress,[148] or to exercise any authority at all over nonmembers.

A landowner can exercise no power over enterers that is inconsistent with state law, but no case had ever suggested such a limitation upon tribes. It is not at all uncommon, moreover, for the states to exercise authority over persons who cannot participate in their elections and governance. They constantly regulate the behavior of out-of-state residents in transit or domiciled within their borders.

Rehnquist responded that Congress has power to regulate the

affairs of Indians on *or* off-reservation, regardless of the ownership status of the situs.[149] If the United States has authority to regulate the Mazuries, it can moreover delegate this power, perhaps not to private associations, but "where the entity exercising the delegated authority itself possesses independent authority over the subject matter."[150] Tribes "are a good deal more than 'private, voluntary organizations,'" he concluded, and "possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life," intimating but not expressly ruling that the Wind River Tribal Council may have had power to regulate the Mazuries' business even in the absence of a congressional grant of authority.[151] The result was to uphold tribal licensing powers extending territorially to the exterior boundaries of the reservation without regard to race or ownership, *in this case,* but Rehnquist was careful to avoid generalization. He neither revived "infringement" nor proposed an alternative theory of tribal sovereignty, continuing the *McClanahan* tradition of denying the existence of principles. Any illusions that a general territorial sovereignty principle was in the making should have been shattered by *DeCouteau v. District Court,*[152] decided two months after *Mazurie. DeCouteau* involved a question already familiar to the Court: whether Congress by opening a reservation to non-Indian settlement had intended the dissolution of tribal self-government. The rule of *Carpenter v. Shaw* that "[d]oubtful expressions" are to be resolved in favor of the tribes had been interpreted to require that Congress' intent to terminate a tribe "be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."[153]

The bulk of Justice Stewart's majority opinion concentrated on the evidence offered at trial, which he deemed sufficient to prove that both Congress and the tribe itself understood an act of 1891 to terminate the tribe's territorial powers.[154] He approved of the cases establishing a presumption against termination of a reservation, and agreed that "[w]ith the benefit of hindsight, it may be argued that the Tribe and the Government would have been better advised to have carved out a diminished reservation," instead of ceding all unallotted territory, but concluded that reinstating the original reservation as a territorial entity was simply too drastic a remedy for bad policy.[155] "Some might wish they had spoken differently, but we cannot remake history."[156] Stewart distinguished earlier cases construing the opening of reservations to settlement on the basis that they lacked the element of tribal consent, and did not involve such strong language of cession and relinquishment.

All apart from interpretations of the language used in the negotiations and documents,[157] the majority avoided the fact that the tribe had continued to act as a self-governing body after the cession and up to the time of trial. It adopted an Indian Reorganization Act constitution in 1946 and continued to be administered and funded by the Bureau of Indian Affairs, which maintained an agency within the original reservation area.[158] "This tribe is a self-governing political community," Justice Douglas argued in his dissent, "a status which is not lightly impaired."[159] While the articles of cession bound the tribe to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation,"[160] they nowhere referred to any cession of the *jurisdiction or governance* of that territory.[161] Treaties of cession are more explicit, *e.g.*, the treaty of cession of the Louisiana Territory to the United States: "[T]he first Consul of the French Republic doth hereby cede to the United States, in the name of the French Republic, *forever and in full sovereignty,* the said territory, with all its rights and appurtenances, ..."[162] Compared with uninterrupted political recognition by the executive branch and annual appropriations for the maintenance of tribal government by Congress, the ambiguous language used in 1891 is weak evidence. Moreover, subsequent acts of Congress recognizing and subsidizing the tribe[163] supersede anything in the 1891 agreement that may have terminated it as a body politic.

All jurisdictional boundaries, to be sure, create distortions: inefficiencies in law enforcement, frustration or areal land-use planning, and redistributions of wealth due to tax and regulatory differentials across the boundary.[164] It is a matter of degree. Divide a simple, rectangular 1,250-square-mile tract into a checkerboard of about eight hundred noncontiguous 160-acre allotments and a 150-mile perimeter is converted into 13,843 miles of intersecting boundaries.[165]

Williams and *McClanahan* relied on the actual historical record of tribe-federal relationships for evidence of the tribe's status; both made much of acts of Congress designated for the tribe's special benefit. *DeCouteau,* by contrast, disregarded such evidence, relying instead upon a single, historically remote event reported second-hand. Nor did the majority respect the rule of *Carpenter v. Shaw* to construe the inconsistencies in the historical record in the tribe's favor. This may well explain why Thurgood Marshall, author of *McClanahan,* joined in Douglas' dissent to *DeCouteau.* Ironically, *McClanahan* was decided two years *before* Congress

recognized Indians' "desire" for self-government in the Indian Self-Determination Act,[166] *DeCouteau* three months afterwards.

Only two months prior to its decision in *Three Affiliated Tribes v. Moe,* the Supreme Court in a brief *per curiam* opinion at last purported to apply the infringement test. *Fisher v. District Court*[167] challenged a Montana state adoption action involving a minor resident of the Northern Cheyenne Reservation. Citing *Williams, McClanahan,* and *Mescalero.* it reasoned that as there was no applicable federal statute conferring jurisdiction on the state, the case turned on the impact of state adoption proceedings on tribal self-government.[168] Toleration of state jurisdiction would, the Court argued, result in conflicting adjudications of custody, a "decline in the authority of the tribal court," and a clear infringement upon the tribe's regulation of its members' domestic relations.

Like *McClanahan, Fisher* used the state's enabling act as one piece of evidence that Congress had *not authorized* it to assume jurisdiction over the tribe. Montana's Enabling Act, set out in part in the opinion, includes the same "absolute jurisdiction and control" language *Draper* and *Kake* held ineffective to preserve tribal rights. *Fisher* not only considered the language of the act relevant, as *McClanahan* had, to rebut the legitimacy of the state's claims, but made the remarkable statement that Cheyenne sovereignty had been "unaffected" by passage of the act—citing for authority both *McClanahan* and *Kake*![169] *Williams* held in effect that a state, merely by being there, could extend its jurisdiction over tribes without express federal authorization *up to the point* that so doing infringes upon tribal functions. According to *Williams,* then, the creation of the state *had affected tribal sovereignty. Fisher* and *Williams* apply the same test but are fundamentally contradictory in theory.

Only a bizarre fiction can reconcile *Fisher* and *Williams.* By hypothesis, the infringement test distinguishes between state actions that impair or affect tribal self-government and those which do not. If the state exercises only such powers within reservations as do not infringe upon tribal self-government, the tribe (in theory) is no more restricted now than it was aboriginally. This is an exercise in assuming the conclusion. The fact that the infringement test is weaker than a territorial test forces us to the conclusion that some attributes of sovereignty jealously guarded by the states have been lost to tribes after *Williams.* If their powers, aboriginally, were territorial, as we have no reason to doubt they were, then they were unmistakably "affected" by statehood.

Fisher also tantalizes us with a fleeting reappearance of the preemption theory of *Warren.* Montana argued that it had been routinely exercising civil jurisdiction over the Cheyennes prior to the organization of the current tribal government in 1935, and therefore, in the absence of any express federal law to the contrary, had not been divested of this power. The Court responded that the Indian Reorganization Act had "overridden" and "preempted" Montana's prior jurisdiction.[170] Was the *Fisher* Court coming around to the possibility that *Williams* itself had been a preemption case in which the preemptive statute had been the Reorganization Act?

It is possible to read *Fisher* as a return to *Williams* and a rejection of the long parade of intermediate cases and their involuted, inconsistent alternative grounds of decision. But which level of *Williams*? *Fisher* approved of the infringement test, whereas *Warren, McClanahan, Mescalero,* and the Alaskan cases had studiously avoided it. *Fisher* also approved of general federal preemption, which *Mescalero* had rejected. Indeed, *Fisher* openly rebuffed Justice Marshall's hint in *McClanahan* that immunities from state regulation are *personal rights* of individual Indians. Montana challenged the Northern Cheyenne Tribal Court as a racist institution violative of the fourteenth amendment.[171] The Court replied unhesitatingly that "[t]he exclusive jurisdiction of the tribal court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law."[172] The Court was not entirely confident that tribal jurisdiction is not racial, however, for in its next breath it cited *Morton v. Mancari* as authority for the lawfulness of reverse discrimination in federal Indian policy.[173]

I have hypothesized that the involution of a legal doctrine is characterized by confusing the grounds for its application. Only within that context can the appearance of *Fisher* be made understandable. After *Williams,* the Court at once embarked upon a program of inventing new rules and resuscitating old rules for disposing of cases to which *Williams* could have been applied. The Court also confused the role of legislation by claiming to rely on it while frequently ignoring it or construing it carelessly, and inventing rules superior to legislation. The reader cannot ascertain the proper scope or future direction of each rule, and *the Court acquires the power to reach any result it wants,* as it has any number of different, inconsistent rules to choose from. *Fisher* renders the uncertainty perfect by offering no explanation why the original case is suddenly once again of unimpeachable validity. In *Moe,*

the Court shifted to another foot, returning the infringement test to its uneasy oblivion.

II. *Three Affiliated Tribes v. Moe and After*

An Economic Error

When the economic nature of a transaction is an operative fact in the application of a federal law, state classification of the transaction is not dispositive. This rule is necessary to give a uniform effect to federal economic legislation. "State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law."[174] Where the form of a transaction, according to state law, differs from its economic substance, a federal court may properly disregard the form altogether in achieving the intended application of federal law.[175]

The Montana district court in *Moe* considered it relevant in applying the infringement test who *actually* bears the burden of Montana's cigarette tax. Accordingly, it should have applied preexisting federal standards or, in their absence, developed objective standards of its own. *Warren* would have provided some guidance because Justice Black's argument there assumed that income taxes on a non-Indian seller are partially passed on to Indian consumers and therefore repugnant to federal policy. Under both federal and state law, the tax paid by the Warrens was legally a tax on them alone, but because the actual *effect* of the tax was relevant, the Court traced it further.

However, the district court relied uncritically on Montana law, according to which the cigarette sales tax, although levied against the seller, is "conclusively presumed to be direct taxes upon the retail consumer precollected for the purpose of convenience and facility only."

> In a sale to a non-Indian without payment of the tax, it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption. It is of course recognized that the seller would have a competitive advantage over non-Indian sellers on the Reservation as well as both Indian and non-Indian sellers off the Reservation through selling at a lower price.[176]

These two sentences are consistent with each other only if the seller passes on 100 per cent of his tax saving to consumers in the

form of lower prices. To begin with, there is no evidence that non-taxed Indian sellers have been doing this. The Director of Revenue of Washington State, an outspoken critic of Indian tax exemptions, recently estimated that about 55-80 per cent of the tax saving is passed on, the rest being retained by the seller.[177] If this is true, the Indian seller is both a direct *and* an indirect beneficiary of the exemption: saved tax in excess of price cuts, and increased volume.

Less than a 100 per cent pass-through of tax savings is predicted from economic theory. Whether a rational seller passes on any cost saving depends upon the anticipated impact of the change in price on volume (or "demand"). He will reduce his unit price by a penny only if it will result in *more* than a penny's-worth of additional units being sold.

Economists describe this in terms of "elasticity of demand." Demand is said to be elastic when changes in price produce relatively greater changes in volume. Conversely, demand is said to be inelastic when changes in price produce relatively smaller changes in volume. The elasticity of demand for a good is ordinarily a function of price. In a competitive market, how much of a tax saving will be retained by, say, cigarette retailers depends upon the elasticity of demand for cigarettes in the relevant price range.

Pre-*Moe* cigarette retailing was not an altogether competitive market, however, because the tax exemption was only available to some retailers, and competition among these retailers was limited by voluntary coordination and tribal regulation. Under such circumstances economic theory predicts two relatively uniform prices: a nonexempt or "non-Indian" price, and a slightly lower exempt or "Indian" price. Because non-Indian retailers cannot reduce their prices further, all the coordinated Indian retailers must do to corner the market is to offer a price that *just more than offsets* consumers' added cost and inconvenience in going to Indian reservations to shop.[178] In a "segmentary" market sellers therefore often retain *more* of a tax saving than in a freely competitive market. Cigarettes are probably rather demand-inelastic, predicting fairly high retention of tax savings by sellers. Add to this the segmentary nature of the market under Indian tax-exemption conditions, and Washington state's estimate of 20-45 per cent retention seems quite conservative. According to the district court, *Warren* held that a gross income tax is an economic burden *on the seller.*[179] Both the gross income tax in *Warren* and the sales tax in *Moe* were collected from the sellers. How is it possible that the former is absorbed by the seller but the latter by

the purchaser? Economics is no respecter of legal labels. Costs are passed on in response to what the market will bear. It is irrelevant whether the cost is called a gross income tax or a precollected sales tax. A 5 per cent gross income tax will be distributed between sellers and purchasers in roughly the same proportion as a 5 per cent sales tax on the same goods.

Warren was not applicable, however, the district court reasoned, because it involved a federally licensed trader, and the plaintiff in *Moe* was simply an Indian retailer.[180] If anything, however, this distinction cuts the other way. The Warrens were non-Indians, but they were immunized from state taxation on the theory that they served a federal purpose. The fact that they were licensed by the United States was accepted as evidence of federal preemption. But the original reason for licensing was to protect Indians from unscrupulous non-Indian traders by specifying the conditions of their entry into Indian country.[181] Understandably, then, Indian retailers have never been required to obtain licenses, although they may own and manage their property under federal supervision. This cannot mean that they were intended to be less protected from state action than licensed traders.

The district court painstakingly avoided the fact that the seller was an Indian business person. Congress has repeatedly pro claimed its interest in reservation business development, to that end providing special loans and loan guarantees for Indians in addition to those ordinarily available from general federal agencies.[182] It is too late to doubt that there is an express federal policy of encouraging Indian private enterprise. But try to follow this reasoning of the *Moe* Court:

> It is clear that the collection of the tax by the Indian seller would impose no tax burden on the Indians residing on the Reservation; nor would it infringe in any way upon self-government. It may reasonably be inferred that *the stores were not established primarily for the benefit of Indian customers* residing on the reservation, but rather to sell cigarettes to prospective customers passing on the highway . . . . *The Indian seller profits from increased sales.* The non-Indian purchasers avoid the payment of a tax legally imposed upon them.[183]

For whose benefit were these stores established? A pragmatist would certainly answer: for the benefit of the owners! Because the owners are Indians, and the court admits, however obtusely, that the state tax depresses sales, reservation Indians do benefit from

non-Indians' sales tax immunity. Congress has been a great deal more explicit in recent years about its interest in promoting Indian businesses than its interest in cutting prices to Indian consumers. The court almost says that Indian business people are not really Indians, so that the benefits they enjoy are not really benefits to Indians. This might not have been out of line fifty years ago, when an Indian was said to have "severed his tribal connections" as soon as he began to farm or labor. Congress has rejected that notion. It is high time the courts did.

The district court confused the situation still further by announcing an entirely *new* rule for determining the limits of state power over reservations, proposing that Indian retailers are "involved with non-Indians to a degree" that would permit Montana to require precollection of the tax.[184] What is the meaning of being "involved" with non-Indians? The court appears to be saying that only transactions among Indians are free from state regulation. Unfortunately, reservations, in common with all political subdivisions of this country, must live by commerce, and most of that commerce will unavoidably be with non-Indians. If the court is satisfied that by engaging in commerce with non-Indians the tribes become subject to state control, it has concluded in effect that tribes must remain poor if they wish to be self-governing.

It was only in a supplemental opinion that the district court considered any economic facts. Emphasizing its obligation to serve its Indian and non-Indian residents equally and the fact that 27 per cent of the children in its Flathead Reservation schools are Indians, Montana claimed that the federal government contributes only about 10 per cent as much to the support of these schools as the state.[185] Montana was actually receiving federal funds for Indian education from four different sources: impact aid, specifically designed to compensate states for the nontaxability of federally controlled lands;[186] the Johnson-O'Malley program, supposed to compensate states directly for the costs of educating Indians;[187] and both Title I of the Elementary and Secondary Education Act, and the Indian Education Act, intended to underwrite remedial and cultural enrichment programs.[188] A study published in 1971 concluded that many school districts were being overcompensated;[189] a second study in 1975 described these programs as "redundant" and suggested that they offset the entire state cost of educating Indians.[190] But Montana only told the district court about its impact aid, and, judging from total national expenditures, that would have been about 26 per cent of its total federal Indian

education grants.[191] Montana also failed to distinguish in its "state contribution" figure state taxes on Indian-owned fee lands and taxes paid by Indians in off-reservation transactions.[192] In fact, Congress granted Montana school lands within Indian reservations before the Indian Reorganization Act,[193] and the revenue from these was omitted in the state's presentation. It is therefore entirely possible that Montana was *gaining* money through its reservation school districts.

"Benefit-burden" arguments are two-sided. The district court conceded that the $12 million expended annually on the reservation by the tribe and the United States is "substantial," and that at least some of it benefited non-Indian reservation residents.[194] About 81 per cent of the residents of the Flathead Reservation are non-Indian.[195] Although many tribal services, such as income maintenance, are limited to tribal members, other services such as police and fire protection, some roads, and utilities are equally enjoyed by all residents. Since the state taxes the property and income of non-Indian reservation residents without limitation, it is overcompensated to the extent of the tribal services delivered to these persons.

Having suggested the possible significance of benefit-burden data and reported Montana's claims of undercompensation, the district court was at a loss over how to proceed. "We are unable," it complained, "to determine with exactitude the net effect of the loss of tax revenues to the state . . . because of the unique status of the Reservation and the Indians living thereon."[196] At the very least, the court should have required the state to bear the burden of proving a substantial net loss from Indian tax immunities. It is elementary that courts do not simply assume that a party has been injured on the basis of its own unsubstantiated allegations.

Fortunately, the district court rejected the state's argument that the Flathead Reservation *no longer existed.*[197] There was no evidence of congressional or tribal intent comparable to that introduced in *DeCouteau,* although in his dissent Judge Russell Smith argued that the reservation would have become completely absorbed into Montana had Congress not cut short the allotment program as early as it did, and that it had never been as completely self-governing as the Navajos.[198] He also argued that reservation tax immunities are unconstitutional because they have purely racial criteria, a suggestion the majority rejected on the basis that federal legislation applies to members of treaty tribes, *i.e.*, a political rather than racial category, and fulfills a special federal responsibility.[199]

The most significant point made in the dissent was that members of the tribe are also legally citizens of the state of Montana.[200] As Judge Smith observed, this paradox has never been reconciled. The Indian Reorganization Act post-dated Indian citizenship by ten years and negates the implication that Congress intended the Citizenship Act to dissolve the political existence of tribes. The Citizenship Act has nevertheless been interpreted to guarantee reservation Indians the right to vote and hold office in the states. Judge Smith reasoned that Indians cannot have it both ways—they must assume all of the burdens, as well as the benefits of state citizenship. However, he ignores the alternative. Tribal members never demanded state citizenship to the exclusion of tribal self-government. If the two are incompatible, tribes may reasonably choose to assume full self-governing powers and relinquish claims to participate in the state political process.[201]

Error Vindicated

The writing of the Supreme Court's opinion in *Moe* fell to Justice Rehnquist, author of *Mazurie.* His reasoning again failed to crystallize the issues. If anything they emerge less structured than before. However, one thing was decided unambiguously: the holding of the district court would stand.

At the outset Rehnquist confused the grounds for federal jurisdiction to enjoin state collection of the tax with the basis for the claimed tax immunity.[202] While Section 1362 of Title 28 of the United States Code confers original jurisdiction on federal district courts to determine civil actions brought *by tribes* to resolve federal questions, Section 1341 of the same title, an earlier statute, prohibits federal courts from enjoining the collection of a state tax "where a plain, speedy and efficient remedy may be had in the courts of such State."[203]

The district court disposed of this conflict by noting that the barrier of Section 1341 is not applicable to cases brought *by the United States* "to protect itself *and its instrumentalities* from unconstitutional state exactions."[204] Rehnquist agreed. Relying on two cases decided more than fifty years *before* enactment of Section 1362,[205] he concluded that *the United States* has always had authority to invoke the jurisdiction of its own courts to protect its Indian programs from state interference. With no more foundation than an ambiguous sentence in the report of the House Judiciary Committee, he reasoned that Section 1362 had implicitly extended the same authority to the tribes themselves.[206]

Montana urged the Court to apply *Mescalero* as a bar to federal jurisdiction.[207] In a judicious footnote, Rehnquist agreed that the early cases he cited for federal jurisdiction were "grounded in the federal instrumentality doctrine," which *Mescalero* had "effectively eliminated ... as a basis for immunizing Indians from state taxation."[208] He admitted this gives rise to "a certain inconsistency," and attempted to reconcile it by distinguishing jurisdiction from substantive law. For jurisdictional purposes, he explained, a tribe is a federal instrumentality, but once jurisdiction has been established, it ceases to be a federal instrumentality and must specifically allege and prove express congressional intent that it have each claimed tax immunity![209]

Recognizing that *McClanahan* can be read for a presumption against state power, the state tried to argue that such a presumption is inappropriate in the case of the Flatheads, a tribe, it contended, substantially less autonomous historically than the Navajo. Rehnquist agreed with the district court that the Flathead Tribe is "now so completely integrated with the non-Indians... that there is no longer any reason to accord them different treatment from other citizens."[210] But in so doing he implicitly conceded the legitimacy of a demographic test of tribal sovereignty, which he rejected in *Mazurie.* Nor did he indicate what evidence, if any, he would accept to prove that another tribe *is* substantially assimilated and therefore not entitled to presumption in its favor.[211]

Rehnquist proceeded to *Williams.* He refused to reconsider the district court's economically absurd finding that the purchaser bears the tax, agreeing that Montana law is determinative.[212] However, the district court had repeatedly remarked on the competitive advantage given the Indian retailer by the tax immunity, cutting against its own holding for the state. Rehnquist would not permit this to stand either, lest it suggest any "infringement" of the tribe by the state tax.

> Since nonpayment of the tax is a misdemeanor as to the retail purchaser, the competitive advantage which the Indian seller doing business on tribal land enjoys... is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked.[213]

In other words, the Indian sellers' competitive advantage arises

solely from non-Indians' violations of Montana law, and is therefore, by implication, not a legitimate Indian interest for infringement test purposes. Of course, the whole issue in the case was whether purchases of unstamped cigarettes on tribal land is in violation of Montana law. Rehnquist assumed his conclusion.

Having dismissed all of the evidence that the state tax would be a direct economic burden on Indian retailers, Rehnquist turned to the question of whether Indian retailers' required precollection of the tax from consumers would itself be administratively burdensome and involve risk of state prosecution. *Williams* held that state courts cannot reach Indians within a reservation without their consent because to do so would infringe upon reservation self-government and reservation courts. *Fisher* agreed.[214] Rehnquist did not even suggest a reason for his conclusion that there is "nothing in this burden which frustrates tribal self-government."[215] If this is true, it is difficult to see what it was in *Williams* and *Fisher* that *did* frustrate tribal self-government.

The states have two means of enforcing their taxing rights under *Moe*: prosecution of non-Indian consumers in possession of untaxed cigarettes, and the power to search vehicles entering and leaving reservations. The district court's opinion rejected the first of these as "costly and ineffective," but "[m]ore importantly, it would mean that the Indian seller of the cigarettes could aid and encourage non-Indians in disobeying the law and be immune from prosecution."[216] The power to search and seize vehicles entering and leaving the reservation would seem to be adequate to enforce state retail sales tax laws. It is difficult to understand how Indian retailers could "help" customers avoid such a scheme. Furthermore, administrative efficiency is usually not a sufficient basis for deciding questions of jurisdiction. It is frustrating for a city such as New York to collect its nonresident income taxes from out-of-staters, but that does not legitimize its attaching and executing against out-of-state land or other property. Most due process rights are "inefficient," if we examine only their administrative cost.[217]

Williams referred to "the right of reservation Indians to make their own laws and be governed by them" as synonymous with infringement. The power to make a law must also be the power to forebear to make it. Either may serve a rational policy. In *Williams* there was no required finding that the Navajo Tribe had provided civil remedies for debt in its courts, before a Navajo could claim immunity from a debt action in a state court. Thus, in *Williams*, the state had not interfered with a tribal law, but with a

subject matter upon which the tribe might legislate. Consistent with *Williams*, a state's power to tax within a reservation should not turn upon whether the tribe taxes the same objects.

Suppose, in a future case, the tribe does levy its own sales tax. If the Court assumes that sales taxes fall entirely on consumers, it will also assume that collection of a state sales tax will have no effect on collection of a tribal sales tax: both will be borne by consumers. The extra tax will depress sales, but the Court has already dismissed the relevance of this effect.

Economically, simultaneous state and tribal taxation would pose problems for both governments. Increasing the tax load on goods will usually have some effect, greater or lesser depending upon the elasticity of demand, upon volume of sales. The yield of a sales tax is a function of both the size of the tax (tax effort) and the number of taxable units sold. Within a certain range, increases in tax effort will increase tax yield. Beyond that range, increases in tax effort will actually decrease tax yield by substantially depressing sales. The fact that Indian cigarette retailers before *Moe* did not actually pass on all of their tax savings is evidence that they would largely bear any additional taxes. Tribes would therefore have some difficulty collecting a large tax, assuming that they ever chose to take a course of action so potentially ruinous to tribal businesses.

Williams could be interpreted to stand for the right of *Indians* to be governed by *their* own laws, reading the second clause of the sentence with greater emphasis than the first. The corollary would, of course, be that there is no right or obligation for *non*-Indians to be governed by Indian laws. Neither *Williams* nor *McClanahan* rebut this implication because both are cases in which state law was to be applied to an Indian. *Warren* involved a non-Indian, but it can be reconciled with the other cases on the grounds that it rests on an entirely different rule—that trading posts are peculiar federal instrumentalities wholly governed by federal statutes.

Moe does not suggest that tribes lack power to regulate non-Indians within their borders, a power already well established in the tax field,[218] and not precluded in other subject areas.[219] It must be construed as embracing a notion of *concurrent* tribe-state jurisdiction over non-Indians on the reservation, to the extent that these non-Indians' activities do not directly affect Indians.

As precedent, *Moe* provides the Court with still more room to equivocate in tribal jurisdiction cases. "Infringement" implies that jurisdiction over a reservation transaction between an Indian and

a non-Indian must be tribal to protect the Indian party's interest in being governed by his own law. *Moe* indicates that if the "beneficiary" of the transaction is non-Indian, the transaction is susceptible to concurrent state jurisdiction. The concept of "benefit" lacks economic sensibility and renders future applications of the *Williams* test uncertain.

Who was the beneficiary of the credit sale in *Williams,* the non-Indian seller or the Indian purchaser? I think it is clear that both intended to benefit, and that the law governing their transaction would affect both of them. *Moe*'s premise that certain bilateral transactions affect only one of the parties, although it may be economically nonsensical, presents a possibility that "exclusive" tribal jurisdiction will henceforth be limited to cases where the Court believes the Indian party is *substantially* affected, or *more* substantially affected than the non-Indian party.

Williams substituted a subject-matter test of tribal jurisdiction for a territorial test, but at least it did not preclude the possibility that tribal power over approved subject-matter is preemptive. According to *Moe*, tribal jurisdiction is *preemptive over Indians and concurrent over non-Indians. McClanahan*, it will be recalled, hinted that reservation Indians' jurisdictional rights are personal rather than territorial in origin, and in *Moe* Rehnquist suggested that the proper standard of decision is whether the state action interferes with Congress' plans *to protect individual Indians*, not the tribe's right to self-government.

Only a year earlier in *Mazurie* Rehnquist rejected the Tenth Circuit's theory that tribes are mere voluntary associations. The Montana district court equated tribes with private landowners. A private association of tenants in common has more power over members than nonmembers, although it has limited power to control nonmembers' activities while they are within its property. This is roughly the situation of tribes after *Moe.*

The Forgotten Legislative Record

Throughout its treatment of reservation jurisdiction, the Court has expressed a desire to scrupulously execute the manifest will of Congress. Nonetheless its treatment of at least one extremely pertinent law leaves much to be desired. The Buck Act[220] speaks directly to the issue, authorizing the states to tax motor fuels,[221] sales and use,[222] and income[223] within "Federal Areas," and affording some basis upon which to exclude Indian reservations and reservation activities from its effect. Federal "instrumentalities"

are expressly exempt,[224] but, of course, since *Mescalero* the Court no longer includes tribes and tribal operations in this category. The Buck Act does not authorize taxes "on or from any Indian not otherwise taxed,"[225] but that speaks to a personal right of Indians not inconsistent with the holdings of *Williams, Warren*, or *McClanahan*, or the rule of *Moe.* It says nothing about taxation of non-Indians on reservations.

"Federal Area" is defined as lands "held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States."[226] Do Indian reservations fit this description? It would be hard to characterize them as "for the use of the United States," especially since the Indian Reorganization Act describes reservation lands as being "for the exclusive use of Indians."[227] Tribes and their members are the beneficial owners of all tribal and allotted lands within reservations, although the United States, as "trustee," may be the record owner.[228] The United States is accountable to the tribal beneficiaries in the same manner as any other fiduciary.[229]

There is even a question as to whether all reservation land was "acquired by" the United States. Although much was purchased for tribes under the authority of the Indian Reorganization Act, much more consists of original tribal territory that was simply never ceded to the United States. Congress has elsewhere expressly distinguished between purchased and original reservation lands.[230] When a tribe cedes some of its original domain, reserving the balance as a reservation by treaty, this reserved balance is hardly "acquired by" the United States.

The Constitution authorizes Congress to exercise "exclusive Legislation" over the District of Columbia and "over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines. Arsenals, Dock-Yards, and other needful Buildings."[231] The relationship between this provision and Congress' power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"[232] has never been completely untangled. The debates on the draft Constitution suggest that the property clause was to apply to lands acquired outside of the states, and the exclusive legislation clause to lands purchased from the states. In any event, the two clauses together undoubtedly encompass lands "acquired by or for the use of the United States."

The Marshall Court attributed federal Indian powers to the treaty and commerce clauses, appropriately enough, a view concurred in by more recent Courts.[233] Although in dealing with reser-

vation jurisdiction the Court once analogized to the federal power to govern territories, it argued that this power *does not arise from the property clause, but out of necessity*.[234] If Indian reservations are governed by the treaty or commerce clause, or even by some principle of necessity, they are not subject to laws enacted under any of the other parts of the Constitution. There were Indian reservations in 1947. If the draftsmen of the Buck Act had wanted to include Indian reservations, they could have done so explicitly. As worded, the Act appers to be no broader than the authority of the property and exclusive legislation clauses.[235]

That Congress can speak clearly when it wants to on such matters is evidenced by the Federal Power Act,[236] passed ten years subsequent to the Buck Act. Section 3(2) of the Federal Power Act defines "reservations" as "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." The Supreme Court has interpreted this to make federal ownership the operative fact. Hence, an Indian community, albeit recognized by the United States, is not a "reservation" for F.P.A. purposes if located on fee patented lands.[237]

The Assimilative Crimes Act is limited in scope to lands "reserved or acquired for the exclusive use of the United States."[238] The phrase "exclusive use" facilitates interpretation; it cannot refer to lands in which local governments or private persons have some interest. The sponsor of the Act in 1825 described it as applicable to crimes "in a fort, magazine, arsenal, or dockyard, belonging to the United States."[239] Indian reservations in their contemporary form did not exist in 1825. Nevertheless when the Act was revised in 1908, long after the establishment of the current reservation system, the sponsors of the revision interpreted the "exclusive use" language as limiting its scope to a "postoffice, court-house, or public building."[240]

The records of Congress indicate, however, that while the definition of "Federal Area" in the Buck Act seems to exclude Indian reservations, tax protection was intended to be limited strictly to "Indian(s) not otherwise taxed." The original bill referred to "national parks, military and other reservations," without further definition.[241] However, it was vigorously supported by the states of Arizona, New Mexico, and Washington in the apparent expectation, not denied by any member of Congress, that Indian reservations were to be deemed "other reservations."[242] Senator

LaFollette of Wisconsin introduced an amendment that would have made the Buck Act inapplicable to "any transaction" occurring within an Indian reservation. Supported by the Interior Department, it was vigorously opposed by Senator Buck and the states.[243]

On the other hand, no desire was expressed to tax reservation *Indians.* Representative Dempsey of New Mexico expressed himself agreeable to exempting all sales *to Indians* from the operation of the Act.[244] Even the Interior Department was unwilling to press for the "any transactions" language of the LaFollette amendment, expressing itself concerned solely for taxes levied directly upon Indians.[245]

All of the bitterness vented at the hearings was directed at non-Indians. Dixwell Pierce of the California Board of Equalization hoped the Buck Act would "prevent these borders of the reservations from becoming barriers behind which private persons engaged in business . . . may hide and say unpleasant things to those of us who are trying to collect taxes uniformly within the State."[246] Representative Dempsey complained about "tourists" and non-Indians resettling on Indian reservations to evade taxes, adding his opinion that the land acquisition provisions of the Indian Reorganization Act were a "subterfuge" of Congress to deprive the states of taxes.[247] He also promised that *if* any Indians began to operate their own retail businesses, New Mexico would not seek to tax their sales to anyone, Indian or non-Indian.

The Buck Act was most heatedly opposed by the armed forces. Representatives of the Army, Navy, and Marine Corps testified against it; it was also opposed by the House Committee on Naval Affairs.[248] Their objections to state taxation of purchases made by military personnel at military stores were met with unanimous agreement that federal "instrumentalities" should remain tax exempt.[249] There seems to have been a general understanding that military personnel, the same as military property, are "instrumentalities" of the United States while on federal land and when engaging in transactions with the United States.[250]

It thus appears that the Supreme Court could have reached the *Moe* result merely by reading the Buck Act and its legislative history—thirty years earlier. *Moe* purports to follow *Williams* but it is not an infringement case, unless the most obvious basic realities are ignored. Nor is it a preemption case, and certainly it is not a case of territorial jurisdiction. Although Rehnquist nowhere admitted to it, *Moe* is, after all, an instrumentality case. Individual Indians within Indian reservations are the instrumentali-

ty, just like the individual military personnel within military reservations. Indian property is exempt while it remains in Indian hands because it shares the status of character of the possessor. When leased, it assumes the character of the lessee.[251]

The Supreme Court acknowledged the Buck Act briefly in *Warren*[252] and again in *McClanahan*.[253] Neither opinion accorded it much significance. Justice Marshall observed in passing in *McClanahan* that,

> While the Buck Act itself cannot be read as an affirmative grant of tax-exempt status to reservation Indians, it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxation had it thought that the States had residual power to impose such taxes.

He referred, of course, only to the express exemption of reservation Indians in the Act.

Why did the Court miss such a straightforward solution? The *Moe* rule is actually broader than the Buck Act. It suggests that *all* tribal powers exercised over non-Indians are concurrent with the states. It is a general statement about the nature of the reservation-state boundary, while the Buck Act was merely a concession of some reservation revenue to the states.[254] By ignoring the full significance of the Buck Act, the Court established itself superior to Congress in determining the nation's Indian policy. Nor was this the only occasion on which the Court avoided close reading of the laws it purports to strictly construe and apply. In *Mescalero*, the Court busied itself looking for express exemptions of tribal lands, not express delegations. This is what Douglas criticized, and why he made a point of reminding the Court of *Carpenter v. Shaw* and the rule of liberal construction in favor of tribes. Title 25 of the United States Code is a maze of innuendoes and negative inferences in the tax area, many not yet discovered by the Court. For example, the rules for granting rights-of-way for pipelines and telephone lines across tribal and allotted lands provide that "nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority," and then refers mysteriously to lines "not subject to State or Territorial taxation."[255] Which lines did Congress assume were subject to local taxation in 1901 and 1904 when it originally enacted these laws?

These tax-saving clauses do not appear in the right-of-way rules

for railroads enacted at about the same time.[256] We are left with the impression that some rights-of-way on some reservations are taxable and others are not, but Congress offers us no further guidance. There were no other federal laws at this time to provide clarification, so Congress must have assumed that the courts had already formulated adequate rules and needed only to be preserved from statutory interference. But there were no clear judicial rules. The Supreme Court heard no major reservation tax case between 1867 and 1903, and in the latter case departed completely from the rule of the former.[257]

Congress was clearer twenty years later when it dealt with incipient reservation resource development and authorized state taxation of oil, gas, and minerals severed from tribally owned lands, without power of foreclosure.[258] Congress also empowered the states to tax any or all of the property rights of lessees of tribally owned lands within Executive Order reservations.[259] When it provided for the lease and sale of timber and other reservation resources, however, state taxation was not mentioned.[260] Lessees' reservation property, other than severed minerals or property on Executive Order reservations, must therefore be tax exempt. Yet, in recent years, the Supreme Court has consistently approved of state taxation of such interests, relying on common law principles.[261]

A decade later, the Indian Reorganization Act provided that "lands or rights acquired" for tribes under its authority "be exempt from State and local taxation."[262] Did this supersede the tax provisions just discussed? If so, then mineral production from tribally owned lands acquired *after 1934* is tax exempt. This interpretation is supported by the language of the Oklahoma Indian Welfare Act passed in 1936.[263] Like I.R.A., this subsequent law authorized land acquisition and exempts the acquired lands from state taxation. However, it specifically excepts oil and gas production from the exemption, saving, in effect, the earlier provisions for state provisions for state taxation of these minerals. When Congress later enacted special land-acquisition programs for individual tribes, tax exemption or nonexemption was provided for expressly.[264] As far as I can determine, the Supreme Court has never considered the effect of these statutes on one another.

If Congress can be explicit, it rarely chooses to do so. Title 25 includes only one truly general rule of tribe-state jurisdictional conflicts: the states can condemn allotted lands.[265] Elsewhere, references are made to the most limited cases. For example, a handful of tribes were subjected by statute to state probate laws

for limited purposes or periods of time.[266] Doesn't this imply that the states lack probate jurisdiction in all other cases? One tribe may mortgage land—subject to state law.[267] Until 1973, when Congress granted a blanket state and federal tax exemption to Indian claims judgment fund distributions,[268] a separate provision was enacted for each individual tribal judgment creditor. Provisions for taxation of tribal assets upon liquidation were equally diverse. Some granted immunity from both federal and state taxation (or simply "taxation"),[269] some from federal taxation alone,[270] and some allowed no exemption at all.[271] Special, more complex exemption schemes are also found.[272] Congress obviously has no difficulty being specific about tax status in dealing with distributions of funds or property to Indians. Why, then, has it never spoken more clearly to reservation tax status generally? [273]

It is understandable that the Court shies away from comprehensive statutory interpretations, tending rather (as in *McClanahan*) to select one or two isolated examples for boilerplating. What is so remarkable is the Court's loud protestation that the statutes are all-defining and quite clear. In effect, the Court has been searching, unsuccessfully and erratically, for general principles to fill the vacuum left by Congress, and blaming Congress for the unsuccessful and erratic results.

III. *The Politics and Economics of Moe*

Taxation and Public Policy

Taxation is an essential function of government. Our own political traditions affirm this general principle. Alexander Hamilton wrote in *The Federalist*:

> Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular one of two evils must ensure: either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy and in a short course of time perish.[274]

"How is it possible," he asked, "that a government, half supplied and always necessitous, can fulfill the purposes of its institu-

tion; can provide for the security, advance the prosperity, or support the reputation of the commonwealth?"

The same observations can be applied with equal force to state, local, and tribal government. Indeed, there is growing awareness of the negative impact of current high levels of federal taxation on the abilities of the states to support their own domestic programs,[275] a danger the anti-Federalists warned of during the ratification controversy.[276] If the tenth amendment preserves the right and power of the states to regulate their domestic affairs, it does not, however, appear to guarantee them sufficient resources to that end.

The taxing power must be understood as serving similar functions both in its exercise and nonexercise. Whether an object is taxed or not is a question of distributive policy and economic efficiency. The same result can be accomplished by a tax or an exemption, but at a different cost of administration and with greater or lesser effectiveness.

In capitalist political theory, the government should become involved in the production of goods only to the extent that the market fails to supply them. A "public good"[277] is exemplified by national defense. An effective defense system requires national coverage and central control. It is difficult to imagine how individual citizens could "buy" defense from private suppliers. Another example of a public good is "infrastructure," the network of transportation, communication, and supply lines that increase the value of land as a place to locate a residence, business, or industry. Infrastructure costs tend to be great and are paid back very slowly by utility users. It is usually not profitable for an individual to create an infrastructure and depend upon immigrants to pay him for it. There are exceptions: many real estate subdividers bear infrastructure costs such as sewer and power lines, and then sell the increased value of the sites.

Industrial infrastructure, like defense, is also much more valuable when it is planned and comprehensive, rather than "just growing" like Topsy. Imagine, for example, a highway system built in sections by each adjacent landowner. These considerations justify government in taxing the public and buying the public good itself. The taxes collected should, dollar for dollar of benefits acquired, be considerably less than the cost of providing similar benefits through the private marketplace.

Another efficiency justification for taxation arises when an activity imposes costs on others and there exists no adequate private remedy. This is the theory behind proposals for "effluent

discharge taxes" on industrial polluters. The effects of industrial pollution are widely and thinly spread out through the population. It would be extremely costly for all affected to individually press legal claims against the polluters; the cost of each action might well exceed the value of each individual claim.[278] Unless the industry is forced to bear (or "internalize") its true costs, however, it will operate at an inefficiently high level of output dictated by its deceptively large profit margin. A tax on the industry proportional to the estimated "external" cost of its activities reduces its profits and slows its operation. The revenue can be applied to the relief of persons affected by the industry, and the cost of administering a single tax would be less than that of bringing numerous lawsuits.

A tax may also serve purely distributive functions. These, too, are legitimate aspects of public policy. A tax on liquor sales with revenue applied to education has the effect of decreasing consumption of liquor. It reduces the relative welfare of people who choose to drink. There may be an arguable efficiency consideration, such as benefits gained to the public at large from fewer drunk drivers (everyone experiences a lowered risk of traumatic death). But in some cases it may simply reflect a negative public attitude toward drinking.

Just as a tax can decrease the rate of activity, a subsidy can increase it. Tax and subsidy are frequently combined. A less favored activity is taxed and the proceeds are distributed to a more favored one. Another incarnation of the tax subsidy is a tax exemption or immunity from a general tax. Tax exemptions, like taxes, may have efficiency or distributive objectives. A common theory in the nineteenth century was that certain industries, especially railroads and canals, benefited more people than those who paid fares to use them. This "external" benefit, the same as an external cost, needed to be quantified and entered into the industry's calculations so that it would operate at the proper level of output . A railroad adjusts its activities to the fares it collects, not to all of the benefits it produces. Finding some way for it to enjoy the value of all of its benefits will, presumably, increase its activities and attract more investment in railroading. Income tax deductions, special depreciation allowances, and tax-exempt bonds are all possible ways of using the tax system for this purpose.

Tax exemptions and direct subsidies can be used to accelerate growth. Free market theory assures us that if a newly developed product is net beneficial (benefits outweigh costs), it will be pro-

duced and marketed. But in the real world there is a lag time during which manufacturers save capital and expand up to the full capacity that consumer demand will bear. This process can be accelerated by granting manufacturers free capital, by lowering their taxes and thereby increasing their savings rate, or, as many courts have done in the case of experimental drugs, immunizing them from liability for the unforeseen dangers (costs) of their products. We obtain only what the free market would have provided, but sooner.

Indian reservations are particularly needy of tax incentives for two reasons, underdevelopment and uniquely high business costs. Already far behind the rest of the nation in income and employment, tribes have a legitimate interest in accelerating economic growth on reservations. They have such paltry tax bases, consisting largely of federal employees' incomes and the very businesses they seek to attract,[279] that an offer of shelter from state taxes is far more realistic than direct subsidization. The only alternative is for tribes to demand more grant money from Congress and redistribute it as subsidies to attract businesses from off-reservation, or use it to supply infrastructure. The irony is plain. The states tax reservation businesses, slowing reservation development. The tribes respond by demanding more costly federal economic development programs, which must be funded out of increasing national taxes. These decrease the states' tax bases further, leading to increased state pressure for control and taxation of the reservations. The only way to break the circle is to give tribes preemptive power throughout their territories *not to tax*.[280]

A second factor is the high cost of doing business on reservations. This results from federal regulation of tribal business activities and the use of tribal resources, and the continuing enigma of state jurisdiction on the reservation. Uncertainty, added delay, and administrative costs ("transactions costs") make the reservation, all other things being equal, costlier than the state as a situs for business.[281] Tribes cannot reduce these costs directly; they are in the complete control of Congress, the Bureau of Indian Affairs, and the courts. But tribes can offset these costs by offering tax shelter to relocating businesses. Deprived of the ability to offer tax shelter, tribes must fall back on a much less desirable strategy: price concessions. To attract industry and employment they may have to agree to sell their resources at a substantial discount, or to provide labor at uncommonly low wage rates.[282]

Although Congress is responsible both for high transactions

costs on reservations and for the diminishing tax capacity of the states, tribes and states view one another as the real adversaries. Because the federal government has made the states responsible for many essential services to tribal members, the tribes have little choice but to demand these services without cost. They are poor. Tribal resources are managed by the Bureau of Indian Affairs and are taxed for its use. As a treaty party the United States may have some obligation to serve Indians without cost arising from treaties, but the states, lacking treaties or control, naturally feel imposed upon when delegated service responsibilities. Instead of insisting that the United States fully assume its responsibilities, the states attack tribes, which are more vulnerable, and fight over relatively minor concessions.

During the Buck Act hearings, specific estimates of state tax losses due to federal areas were very low. California argued that its revenues would increase about 1½ per cent if it could tax sales and use on all federal lands within its borders.[283] Illinois complained of several large military posts, but attributed only a $23,800 tax loss to them, scarcely a percentage point in that state's budget.[284] Today, the tax loss figures are larger but still an insignificant part of states' revenues. Washington State estimates a loss of $5.4 million annually on cigarette sales taxes, less than .1 per cent of its current total annual revenue.[285]

In many ways, state pressure for control of tribal tax bases is self-defeating. Tribes will require heavy subsidies to achieve economic parity with the states. Deprived of tax shelters and federal aid to offset reservation transactions costs and to accelerate investment, tribal areas actually become poorer, as the experience of Menominee termination vividly demonstrated.[286] Decreasing tribal growth increases the states' costs of serving tribal members. The choice is really between a temporary burden on state revenues and a permanent one.

The Economics of State Tax Enforcement

Enforcement of *Moe* will decrease the attractiveness of Indian reservations for the location of businesses, whether Indian or non-Indian-owned.[287] However, the immediate adverse impact will fall heaviest on individual Indian entrepreneurs. Until recently, most reservation economic activity has been tribally owned and operated due to tribes' ability to attract public funds and mobilize capital through taxation or resource liquidation. Individual Indian capitalism, long a goal of federal administrators who read dark

hints of socialism into tribal ownership, is a relatively recent phenomenon.

Reservations offer few economic advantages. Cheap and abundant natural resources, where available, are of interest primarily to large, high-capital corporate enterprises. So is cheap labor. The only incentive for small retailing and service businesses is tax shelter. Reservations are rarely near major population centers or located along major arteries. Eliminate the tax shelter and small businesses will relocate where they can secure these other advantages.

Small individual enterprises will not make or break reservation economics. Large-scale resource exploitation is more promising. Tribal developers wholesaling raw materials will avoid at least the narrow effect of *Moe*, but if the state levies a use or excise tax on these goods which it legally defines as borne by the purchaser, *Moe* could be extended to these transactions. States can take advantage of *Moe* by amending their tax codes to match all retail sales taxes with redundant use taxes appropriately defined.[288]

Minimizing the cost of *Moe* to reservation businesses will require that the responsibilities of retailers be made extremely clear. As a matter of policy, clear assignment of duties minimizes waste of resources in litigation and conflict . As a matter of law, citizens have a right to be informed sufficiently to be able to avoid liability.

Under the circumstances, burden of proof is a crucial issue. *Moe* preserves the right of Indians to purchase goods tax-free, but retailers must have a practical opportunity to take advantage of this. The state might (1) require retailers to tax all sales and apply for a refund from the state later, or (2) permit retailers to collect the tax selectively and remit to the state only what they collect. In either case, who bears the burden of proof that a particular sale was made to an Indian? If the burden falls on retailers, they will tend to tax all customers indiscriminately to avoid risk of accounting to the state. On the other hand, retailers' books might be accorded a presumption of validity, leaving the state to prove fraud or collusion. In "infringement" terms, the latter rule involves less cost and risk for Indian retailers and maximizes retailers' incentive to selectively pass on tax savings to their Indian customers.

The aggregate effect of state retail sales taxes on reservation economies is difficult to predict because precise data on reservation commerce is unavailable. As a suggestion, however, Washington State's estimate of a $5.4 million annual tax loss to

reservation sales reflects, at estimated retention rates, as much as two million dollars in reservation income. This is about 6 per cent of the aggregate personal incomes of all tribal members residing on reservations within the state.[289] Tribes themselves in Washington report an aggregate annual revenue from business of only a little more than $5 million.[290]

Benefit/Burden Analysis

The states argue that tax-exempt Indians do not pay for the state services they receive, resulting in a net flow of wealth from state to reservation.[291] If this is true, it is nevertheless not necessarily unlawful. Often the exercise of congressional power results in a net transfer of wealth among states. Legitimacy is determined by the nature and purposes of the power exercised, not its distributive consequences. The recent increase in duties on imports of petroleum was designed to encourage domestic production, but had severe negative consequences on New England, and benefited southwestern oil-producing states. Natural gas pipeline price ceilings work notorious interstate redistributions of wealth in the name of national energy policy. Every time a military installation is closed or a major military technology contract let for national defense purposes, interstate currents of wealth are altered, as the more technology-dependent cities like Seattle are well aware.

If Congress has "plenary power" to provide for Indians' welfare, it matters little as a constitutional matter whether Congress does so by taxing the states for the support of federal welfare bureaucrats, or legislates responsibilities to state agencies to support out of their own taxes. The states should in fact prefer to assume these functions themselves. State administration guarantees that state citizens will fill the staff positions, and provides some measure of local control over policy. On the other hand, under federal administration, the cost would be spread over all fifty states through the federal tax system, instead of falling on about a dozen states.

Assuming for argument's sake that the net flow of wealth between state and reservation is legally relevant, the size and even the direction of that flow is subject to dispute. Unfortunately, no accurate tax and expenditure figures for reservations are available from the affected states, which is surprising in light of the bitter accusations they have made. Quantification must take into account at least these four important, special factors: because reservations are underdeveloped, most Indian consumer income is actually spent off the reservation where it is taxed by the states;

reservation Indians do not benefit equally from all state programs; the federal government partially reimburses the states for tax losses due to reservations and generally pays for a major share of most of the state services available to Indians; and tribes may serve non-Indians.

I will use the state of Washington for illustration. Sales, use, and motor vehicle taxes comprise about 33 per cent of the state's revenue, property taxes only 5 per cent.[292] Since at this time there are few retail stores on Washington reservations, and reservation housing is federally subsidized, nearly all of the expendable income of reservation Indians must flow off-reservation. Consequently they already contribute almost as much in the way of sales and use taxes, and about 33 per cent as much in total taxes as if they were non-Indian state citizens. Adjusting for the fact that Indian median income is about one-half of the state average,[293] I estimate this to be about $2.5 million.

Indians are, per capita, larger landholders than the non-Indian residents of Washington. Approximately 5.8 per cent of the land in Washington is held in trust, whereas reservation Indians comprise less than .5 per cent of the population.[294] Along the coast of Puget Sound, much of this land is valuable as developable shoreline, while in the midsection of the state it has potential, if at all, as developable agricultural and timber lands. Taking the average tax yield per acre on a county-by-county basis to adjust for local valuations,[295] this 5.8 per cent of the state's land base has a potential yield of $2.7 million.

From the state's point of view, then, property tax exemptions are more important than exemptions on retail sales. However, Congress has always been explicit in shielding tribal trust and allotted lands from state taxation, even to the point of providing for the continuation of such exemptions after the state has assumed civil and criminal jurisdiction over the reservation.[296] It is much easier for the states to seek common law decisions in favor of retail sales taxing powers than to challenge Congress' statutory tax exemptions.

Most Washington state revenue supports programs likely to benefit reservation Indians. Education absorbs 41 per cent of the current budget; another 25 per cent provides social services and health programs.[297] Smaller components, such as transportation, may benefit tribes directly or indirectly, as state roads are frequently the principal axes of travel on and near reservations.

Some programs categorically exclude reservations. Political subdivisions and natural resources management take up about 11

per cent of the state budget, but tribal government operations and reservation resource management are financed by the United States through the Bureau of Indian Affairs.[298] Thus, while tribal Indians in Washington may pay only about 33 per cent of their "full" tax share, they do not receive more than 89 per cent of state services.[299]

No consideration of the state is complete without an examination of federal subsidies. In the current budget, 23 per cent of the state's social and health programs are federally financed.[300] Assume, then, that reservation Indians in Washington receive a proportional share of all state social and health services: $9.5 million. Of this, the state contributes 77 per cent or $7.3 million. Paying only sales, use, and other off-reservation transactions taxes, reservation Indians cover perhaps $2.5 million of this. If they paid *all* state taxes, they would cover about $5 million. In either case, the state appears to lose money. That might have been anticipated. Being underdeveloped, reservations have relatively low per capita tax bases.[301]

Special federal grants for Indians must also be considered, however, before a conclusion is made as to net flow of funds. As seen in the case of Montana, these programs involve a much higher federal contribution to the cost of serving Indians than non-Indians in the same state. If we assume that impact aid, Johnson-O'Malley, and other Indian education funds compensate Washington for the full per pupil cost of educating reservation Indian children, the cost of the remaining social and health services provided by the state to Washington reservations is only about $4 million.

Nor is it clear that the state collects only sales and related taxes from reservations. Non-Indian leaseholds, for example, are taxed and the proceeds reported as realty tax revenue. There is also the issue of tribal services delivered to non-Indian reservation residents. Some Washington reservations are encouraging residential subdivisions, which bring in hundreds of tax-paying non-Indians and demand expansion of tribal services. The extent to which these factors offset state contributions is not known.

Even if the state does subsidize reservation Indians to the extent of $1.5 million or more annually, federal grants and contracts made directly to tribes, and Indian-related federal payroll within the state, total at least $10 million.[302] Most of this pays for personal services, so it will recirculate through the state economy as disposable income. This added wealth greatly exceeds the most liberal estimate of the state's net subsidy to tribes, and the state en-

joys it only because it surrounds reservations. The state's tax yield alone on this windfall probably exceeds the apparent net state subsidy to reservation residents.

There is no requirement that all *non*-Indian state residents pay their own way. All taxation redistributes income, especially taxation for education and social services. Making the poor pay their own way defeats the very purpose of the tax. If we suppose for the moment, however, that states are entitled to recoup some or all of their expenditures on reservations, is taxation the appropriate remedy? All that *Moe* does is authorize states to tax *more.* How much more each state will realize depends entirely on its tax structure and the distribution of wealth on its reservations.

The same size tax can be raised a number of ways. Each way may have different "incidents" of effects on behavior and the distribution of wealth. Every tax is therefore the product of the marriage of two kinds of policy: revenue and regulation. If the states' only interest in taxing reservation activities is revenue, allowing them to tax accords them more power than they need. The way they collect the tax may offset or frustrate tribal regulation of social and economic behavior.

The states' revenue interest and tribes' regulatory interest could be reconciled by a system of *requisition.* The state determines how it will be raised. Better information about actual state service expenditures for tribes would be needed, but bringing such information out in the open would provide a basis for regulating the cost and quality of programs.[303] Adjusted for the impact of reservation income on state welfare, requisition formulas may well argue for the reduction or elimination of many pre-*Moe* state taxes on reservations, *i.e.,* by showing the state on the debit side.

It is a fiction that reservations alone provide a unique opportunity for state citizens to "get away with" avoiding state taxes. State citizens avoid state taxes in many other ways that are entirely lawful and completely beyond the power of the states to control. If the states "should" have the power to stop the tax drain to reservations, then, *a fortiori,* they "should" have power to stop the tax drain to neighboring states.

Washington State's cigarette tax stamps cost 16 cents. Oregon's rate has always been lower; it is currently 9 cents.[304] "As a result, purchase of cigarettes by Washingtonians in Oregon boom[s] in the border counties."[305] At times the difference in price between a carton of cigarettes purchased in Oregon and one purchased in Washington has been as high as $1.20, compared with about $1.85 for Indian cigarettes. However, the State Department of Revenue

does not publicize annual tax losses to Oregon, nor attempt to intercept and tax cigarettes bound for Oregon retailers. The import-export clause of the Constitution protects free, untaxed interstate commerce.[306]

In 1948 Congress considered a measure to minimize the redistributive effect of interstate cigarette tax differentials that would have penalized failure to report to the Secretary of the Treasury deliveries of cigarettes in interstate commerce to untaxed distributors.[307] Citizens of states that taxed both the sale *and use* of cigarettes[308] were already subject to state prosecution for receiving mail order shipments of untaxed cigarettes from nontaxing states and not paying the use tax on them. The proposed law did not, therefore, modify the constitutional taxing power of the states. It merely provided them with the information needed to locate and identify violators of extant state revenue laws.[309] This is different from the controversy over Indian reservations, where the state's power to tax at all is in question.

Perhaps off-reservation businesses are the real stimulus behind the reservation taxation issue.[310] They would have just as much reason to complain about tribes' power to subsidize their businesses, tribal ownership of businesses, and special federal programs designed to accelerate reservation growth. All of these things, as well as tax immunity, give Indian businesses a competitive advantage. The Constitution does not require that businesses be subject to the same regulation everywhere. In the tax issue, however, off-reservation businesses find a powerful ally with a common interest—the states. The ambiguity of the law gave the challenge an opportunity for success.

Why Territoriality?

Chief Justice John Marshall observed that "the power of taxation is not confined to the people or property of a state [but] may be exercised upon every object brought within its jurisdiction," and "to the utmost extent to which the government may choose to carry it."[311]

> That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by a grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments are truths which have never been denied.[312]

So much is admitted, but this concurrency of state and federal

taxation has proved a rich source of controversy from John Marshall's time to the present. Taxation is like any other form of regulation and can modify the behavior of its objects.[313] As the early records of the Supreme Court demonstrate, the welling-up of political tensions that would ultimately result in civil war was often expressed in tax conflicts.[314]

Concurrency poses numerous problems. One government may tax an industry to decelerate its growth and raise defense funds; the other, exempt it from taxation to accelerate growth and employment, but tax its employees' wage for school expenses. Unless there is some clear rule according supremacy to one or the other, the policy and revenue consequences of the two taxes will depend entirely upon the accident of who taxes first or taxes nearest to the ultimate source of the taxable property. Neither government can achieve reasonably stable expectations. Attempts by either to protect its policy from the other lead to retaliatory taxes. This is precisely the kind of disharmony the framers of the Constitution sought to avoid.

Establishing the supremacy of one government's laws does not necessarily eliminate the concurrency problem. *The Federalist* never succeeded in answering the argument that the United States, by use of the supremacy clause, could tax the states out of existence.[315] At first, the Supreme Court also militantly defended federal activities from state taxation. "Questions of power do not depend on the degree to which it may be exercised," John Marshall wrote in 1827.[316] The Court cannot accept a state's assurances that its taxes are harmless and will never be abused. "[I]s this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not."[317]

At some point the power of the United States to immunize property from taxation must nevertheless cease. "No doubtevery tax upon personal property or upon corporations, business or franchises, affects more or less the subjects and operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."[318] Fixing upon a meaningful rule was the problem.

> The power [of states to tax], and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in making the

distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application.[319]

Only through adoption of unambiguous standards are "we relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up."[320]

The Marshall Court proposed to divide federal and state tax authority at the point where property "becomes incorporated and mixed up with the mass of property" of the state.[321] States responded by taxing the receivers rather than the carriers of goods; the Court reacted by tracing the economic burden back to the goods.[322] More recently the Court has been distinguishing between goods "at rest" and goods in "a continuous route or journey."[323] The mental gymnastics required in applying these phrases to individual cases are exemplified by the Court's conclusion that gasoline in a tank at an airport prior to being loaded onto a plane is taxable by the state, but gasoline in the plane's tanks when it lands and "rests" at the airport is not.[324]

The Court's attempts to deal with the federal-state boundary are noneconomic, but pseudo-economic. They purport to disentangle interstate and intra-state commerce, an impossible task. Any solution must be arbitrary. We may choose among arbitrary solutions on the basis of relative clarity, an administrative efficiency criterion, or relative effect on the distribution of revenue between the United States and the individual states, a function of power. Or we may agree on the rule that minimizes intergovernmental disputes. There is no "right" rule. Historical fluctuations in the interpretation of ambiguities such as "mingling with the mass of property" of the state probably tend to reflect shifts in the Court's federalist politics rather than the evolution of a "better" boundary line.

The purpose of this discussion is to make a relatively simple but important point. Even where concurrent jurisdiction is required by the Constitution, it invites perpetual conflict and defies neat resolution. As a matter of political policy, it should be avoided whenever there exists a legitimate alternative.

Subject only to federal immunities, a state may "tax at its discretion its own internal commerce, and the franchises, property or business of its own corporations."[325] The operative limitation is the

territory of the state. Territory is a superior rule for resolving conflicts among political subdivisions because it is relatively clear, precise, and objectively ascertainable. It is not subject to judicial construction. Problems arise when legislatures choose as taxable incidents events incapable of accurate location in time or space.

It is inevitable in a system of territorial jurisdiction that some states will profit and others lose from the interstate movement of goods. Differentials in state law affect the net interstate flow of wealth. Congress evens out many of these redistributions indirectly when it subsidizes state programs out of national taxes. Concurrent jurisdiction cannot eliminate redistribution; it can only add uncertainty to the picture.

Refusal to pay taxes is a serious matter. The uncertainty remaining after *Moe* threatens those who test states' assertions of taxing power with criminal liability. In a zone of uncertainty private persons are unlikely to seek to vindicate what they believe are their rights. One reason for a more vigorous application of vagueness standards where criminal penalties are involved is the likelihood that government will act unopposed in areas of uncertainty, not because it has the right, but because the risks involved in testing its actions are too severe.

The individual citizen is thrust into a hopeless dilemma, caught between the assertions of two governments that they may tax or otherwise regulate him. Obedience to both may be economically or physically impossible; yet disobedience to either subjects him to litigation and potential harm. It is particularly incumbent upon thee courts in such cases to follow the tradition of territorial jurisdiction among political subdivisions rather than invent new and uncertain rules.[326]

Conclusion: Moe and the Legal Profession

Indian tribes have acquired a costly habit of relying on federal litigation to resolve fundamental political controversies with the states. State interests are not "represented" in the courts as they are in Congress, and from *Williams* to *McClanahan* tribes were encouraged to believe that they had won significant victories in limiting state power and establishing their own authority. The tribes' illusion of growing security was fed by a consistent failure to recognize the unprincipled and erratic nature of the favorable rulings.

As argued elsewhere, judges and lawyers share an education that excludes mature consideration of tribal government.[327] Few

law textbooks in general use accord Indian law serious treatment. Ignorance is a powerful helpmate of confusion. In an appeal in which the advocates and judges have only briefly investigated an unfamiliar topic, we can expect what is in fact in evidence in the Supreme Court record: abused precedents, citations to inconsistent chains of precedent, essential cases and statutes overlooked, significant social and economic facts disregarded. Litigation feeds on uncertainty, and lawyers profit from litigation. Accordingly, lawyers in the Indian business have an interest in perpetuating uncertainty. In common with the Bureau of Indian Affairs, their usefulness will not outlast the problem it is their task to eliminate.

Ethics and self-interest motivate short-sightedness in the legal profession. If a client insists upon fighting for a short-term gain, his attorney is not in an enviable position. Counseling against litigation in favor of working for deferred payoffs may be unethical because it is not what the client wants. It may also entail deferring the lawyer's own rewards. Whether idealistic or motivated by gain, the advocate may find it difficult to zealously counsel long-range planning.

Legislation is a preferable strategy for achieving clarity in Indian law. A statute is less ambiguous, attracts more notoriety, can be comprehensive, and in the long run may be cheaper to obtain. Judgment is limited to the specific facts of the case. It can only suggest the consequences of litigating similar facts in the future, assuming the court cooperates and provides us with a reasonably visible, concrete rule. To flesh out any rule requires several independent presentations. With careful coordination among litigants in related cases, consolidation of the rule consumes years of effort. Without it, rules become fraught with exceptions, contradictions, fluctuations, and involution. Because a lawyer's ethical duty is to his own client, coordination, which necessarily involves some limitations on each litigant's options, is strictly speaking a breach of ethics by the attorneys. Moreover, for the ascertainment of economic and social reality, courts must rely on the presentations of the parties' lawyers in the particular case. If a fact is conceded or presented erroneously by one advocate and not challenged upon by the other, the court has little choice but to assume it to be true.

A definitive statutory solution to the tribal jurisdiction controversy is now a necessity. Even if tribes are unable to achieve perfect territorial sovereignty, they will gain in certainty and enforceability over the current state of affairs. They will be able to divert their scarce resources from defending, and periodically

struggling to extend their powers along an indefinite boundary line, to the important task of domestic growth and social welfare.

Unfortunately, I suspect that Congress itself would resist a comprehensive measure. *Moe* is a reasonably satisfactory compromise to problems that have pervaded the past generation of Indian policy. States are reluctant to invest in Indian services, or assume any power or responsibility over reservations without taxing power or federal subsidies. This reluctance may have done more to defeat the termination policy in the 1950's than tribal protest. At the same time, the Bureau is reluctant to give up any of its power over the reservation activities that justify its existence. Both the states and the Bureau would be happiest in a world in which the states tax and the Bureau serves. That is, in large part, what *Moe* has brought about. Congress is confronted with a desirable *fait accompli* and can disclaim any responsibility for it to the Indian community. There is little incentive to change it.

NOTES

1. 34 OP. ATT'Y GEN. 171, 180 (1924); Stephen v. Cherokee Nation, 174 U.S. 445, 478 (1899). This label was popularized by Felix Cohen in his FEDERAL INDIAN LAW 90-91 (1946).

2. "[I]t is to be presumed the United States will be governed by such consideration of justice as will control a Christian people in their treatment of an ignorant and dependent race, . . . however, . . . the propriety or justice of their action towards the Indians, with respect to their lands, is a question of governmental policy." Missouri, Kansas & Texas Ry. v. Roberts, 152 U.S. 114, 116-18 (1894). *See also* United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941) ("whether [extinction of Indian title] be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts"); United States v. McGowan, 302 U.S. 535, 538 (1938) ("Congress alone has the right to determine the manner in which the country's guardianship . . . shall be carried out"); Perrin v. United States, 232 U.S. 467, 471 (1926) ("it must be conceded that it does not go beyond what is reasonably essential to their protection, . . . On the other hand, it must also be conceded that, . . . Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts"); Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in nature, the manner of its exercise is a question within the province of the legislative branch to determine, and not one for the courts").

3. On guardianship, *see* United States v. McGowan, 302 U.S. 535 (1938); United States v. Rickert, 188 U.S. 432 (1903); United States v. Kagama, 118 U.S. 375, 383-84 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). For sovereign immunity, the sources are United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940); Turner v. United States, 248 U.S. 354 (1919). *But see* Pub. L. 93-638, § 110(a), 88 Stat. 2203 (1975), 25 U.S.C. 250 (Supp. IV 1975).

4. 25 U.S.C. 476 (1975).

5. DeCouteau v. District Ct., 420 U.S. 425, 444 (1975); Mattz v. Arnett, 412 U.S. 481, 505 (1973).

6. Williams v. Lee, 358 U.S. 217, 219-21 (1959), discussed at length *infra*. The Court relied heavily on the Navajo-Hopi Rehabilitation Act, 64 Stat. 44 (1950), enacted several years before Congress' expression of a general intent to terminate reservations in H.C.R. 108, 67 Stat. B132 (Aug. 1, 1953).

7. Pub. L. 90-284, 82 Stat. 77, § 202 (1968), 25 U.S.C. 1302 (1970).

8. Pub. L. 93-638 § 2, 88 Stat. 2203 (1975), especially §§ 2(a)(2) and 110(b), 25 U.S.C. 450 and 450n. *See* Barsh & Trosper, *Title I of the Indian Self-Determination and Education Assistance Act of 1975*, 3 AM. INDIAN L. REV. 361 (1975). Hopes are raised every time Congress uses the words "sovereignty" or "self-government" in an act.

9. —U.S.—, 96 S.Ct. 1634 (1976).

10. 358 U.S. 217 (1959).

11. 31 U.S. (6 Pet.) 515 (1832).

12. 21 U.S. (8 Wheat.) 543, 593 (1823).

13. PRUCHA, AMERICANIZING THE AMERICAN INDIAN (1973); HAGAN, INDIAN POLICE AND JUDGES(1966).

14. 21 U.S. (8 Wheat.) 543, 558-61 (1823).

15. United States v. Clapox, 35 F. 575 (1888); PRUCHA, *supra* note 13.

16. *E.g.*, United States v. Rickert, 188 U.S. 432 (1903); United States v. Kagama, 118 U.S. 375, 383 (1886). These and similar cases contrast markedly with the language of cases decided just before the imposition of active federal control over reservations. *See* The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-56 (1867), which based tribal immunity from state taxation on the residual national and territorial sovereignty of the tribe, citing *Worcester. Accord,* The New York Indians, 72 U.S. (5 Wall.) 761 (1867). *See also* Mackey v. Coxe, 59 U.S. (18 How.) 100, 103-104 (1855).

17. *Supra* note 2. Some regard for the preservation of tribal laws was considered a matter of good policy, rather than tribal right. United States v. Quiver, 241 U.S. 602, 604 (1916). The Cherokee Nation admittedly enjoyed considerable autonomy even in the late nineteenth century, *e. g.*, Talton v. Mayes, 163 U.S. 376 (1896), but this was probably due to unique historical and political factors. Even fifth amendment limitations on federal disposal of tribal lands were not seriously considered until after passage of the Indian Reorganization Act. *See* Chippewa Indians v. United States, 301 U.S. 358, 375-76 (1937); United States v. Creek Nation, 295 U.S. 103, 110 (1935).

18. *Supra* note 2. *See also* United States v. Sandoval, 231 U.S. 28, 46-47 (1913); Tiger v. Western Inv. Co., 221 U.S. 286, 315 (1911); Lone Wolf v. Hitchcock, 187 U.S. 553, 565, 568 (1903); United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865).

19. 104 U.S. 621 (1881).

20. 165 U.S. 240 (1896).

21. 104 U.S. 621, 623-24. *Cf.* United States v. Bailey, 24 Fed. Cas. 937 (C.C. Tenn. 1834) and United States v. Cisna, 25 Fed. Cas. 795 (C.C. Ohio 1835) (No. 14), in which Justice McLean argued that the United States has constitutional power merely to "regulate Commerce . . . with the Indian Tribes," *sensu stricto,* all other regulation of reservations thereby falling to the several states in accordance with the tenth amendment. This ingenious rule is in direct conflict with *Worcester* and has never been followed, but the holding of these cases has rarely been questioned.

22. 164 U.S. 240, 243-44 (1896).

23. Act of Feb. 8, 1887, 24 Stat. 388 *See generally* D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1973).

24. 164 U.S. 240, 246 (1896). *See also* 25 U.S.C. 349 (1970).

25. Act of June 18, 1935, 48 Stat. 984. Title III provided for a reversal of allotment (now 25 U.S.C. 461 *et seq.*, Title I for local self-government (25 U.S.C. 476-77).

26. *See, e.g.*, Oglala Sioux Tribe v. Barta, 146 F. Supp. 917 (S.D. 1956); Iron Crow v. Oglala Sioux Tribe, 129 F. Supp. 15 (S.D. 1955), *aff'd* 231 F.2d 89 (8th Cir. 1956); Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950).

27. Pub. L. 83-280, 67 Stat. 588 (1953). *See also* 62 Stat. 1224 (1948); 64 Stat. 845 (1950) (New York); 60 Stat. 229 (1946) (North Dakota); 62 Stat. 1161 (1948) (Iowa); 54 Stat. 249 (1940) (Kansas).

28. In fact, some states refused to assert more than a "piecemeal" jurisdiction, a practice retrospectively legitimized by Congress in 1968. S. REP. 841, 90th Cong., 1st Sess. (1967).

29. *Id. See also Hearing, Rights of Members of Indian Tribes, House Comm. on Interior & Insular Affairs, Subcomm. on Indian Affairs,* 90th Cong., 2d Sess. (1968), at 24-27, 30-31, 104, 131, 136.

30. 358 U.S. 217 (1959).
31. 83 Ariz. 241, 319 P.2d 998 (1958).
32. 4 Stat. 729, 735 (1834).
33. 358 U.S. 217, 221 (1959) (emphasis added).
34. *Id.* at 221-22.
35. *Id.* at 222 n.9.
36. *Id.* at 223: "The cases in this Court have consistently guarded the authority of Indian governments over their reservations . . . If power is to be taken away from them, it is for Congress to do it." Arizona had failed to take the steps necessary to assume jurisdiction in accordance with Pub. L. 280.
37. 358 U.S. 217, 220-21 (1959). Also, in his footnote 4 at 219, Justice Black noted that federal power over Indians is derived from the commerce clause "and from the necessity of giving uniform protection to a dependent people," a condescending nineteenth-century theory the Court need not have endorsed. United States v. Candelaria, 271 U.S. 432, 442 (1926); United States v. Sandoval, 231 U.S. 28 (1913).
38. 358 U.S. 217, 219 (1959). Justice Black may have been remembering his own opinion in the case of New York *ex rel.* Ray v. Martin, 326 U.S. 496, 501 (1946), in which he observed that "[t]he entire emphasis in treaties and Congressional enactments dealing with Indian affairs has always been focused upon the treatment of the Indians themselves and their property," rather than matters that "did not directly affect the Indians." This was dictum and was never repeated by the Court.
39. Neither case cited by the Court for this proposition actually held that Indians have a federal right of access to state courts. Felix v. Patrick, 145 U.S. 317, 332 (1892), merely refers to Kansas and Idaho decisions based on state law. United States v. Candelaria, 271 U.S. 432, 442-43 (1926), relies on an earlier decision construing New Mexico state law. As another example, Black cited New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946), one of his own prior opinions, but in a case dealing with non-I.R.A. New York State tribes never supervised by the federal government and enjoying treaty relations *with the state.* See the facts in F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 100 (1960). In *Ray*, Black strictly construed the Senecas' 1794 treaty with the United States as conferring no special political rights superseding earlier state treaties and implicitly preserving the tribe-state status quo. 326 U.S. 496, 501 (1946). *Cf.* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 678 (1974). *See also* 25 U.S.C. 232 (1970).
40. *See also* Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885). The railroad argued that collection of a state railroad tax violated the tribe's express treaty right to limit entry on its reservation to officers of the United States. The Court agreed but concluded that the resulting injury to the tribe was *de minimis. Id.* at 31. The railroad was operating on a federal right of way expressly withdrawn from the reservation. The power of Congress to *substantially* violate its treaty obligations was later established in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). We must also bear in mind that the tribe itself was not a party to this case.
41. 358 U.S. 217, 220 (1959).
42. Black's *Ray* opinion ruled precisely the opposite of *Williams*: "[I]n the absence of a limiting treaty obligation or Congressional enactment each state [has] a right to exercise jurisdiction over Indian reservations within its boundaries." 326 U.S. 496, 499 (1946). *Compare* Surplus Trading Co. v. Cook, 281 U.S. 647 (1930). *Surplus* involved a state tax on personalty located within a *military* reservation, but the Court argued by analogy to what it claimed was then the prevailing rule of federal Indian law: "A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and lead them into the habits and ways of civilized life. Such reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." *Id.* at 651. The Court cited no authority for this sweeping proposition, nor was any authority offered by either side in argument.
43. 358 U.S. 217, 218 (1959).
44. 21 U.S. (8 Wheat.) 543 (1823).
45. 369 U.S. 45 (1962).

46. 369 U.S. 60 (1962).

47. CRUTCHFIELD & PONTECORVO, THE PACIFIC SALMON FISHERIES. A STUDY OF IRRATIONAL CONSERVATION 38-39 (1969).

48. Frankfurter conceded that Alaskans reacted to the traps as "the symbol of the exploitation of her resources by 'Stateside' colonialism." 269 U.S. 45, 47-48 (1962). As traps are so costly to build, trappers tend to be relatively well-capitalized firms, rather than independent fishermen. Alaska's prohibition of traps was in many ways comparable to prohibiting the use of automated machinery in factories to increase state employment levels.

49. *Id.* at 48, 52. In Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), this was held to be an exclusively tribal fishery.

50. 369 U.S. 49-50 (1962).

51. *Id.* at 50-51.

52. But in the companion case, he turned around and argued that "[t]he power of Alaska over Indians... is the same as that of many other States." 369 U.S. 71 (1962). Several years later the Court implicitly approved of Frankfurter's original distinction, refusing to extend either *Metlakatla* or *Kake* to a non-Alaskan case. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 168 (1973).

53. 369 U.S. 45, 53 (1962). The Navajo Tribe was originally governed under a very similar administrative arrangement. Shepardson, *Navajo Ways in Government. A Study in Political Process,* 65 AM. ANTHRO., Pt. 2 (No.3 1963).

54. 369 U.S. 45, 54-59 (1962).

55. *See* 25 C.F.R. 88.3 (1976).

56. 369 U.S. 45, 61 (1962).

57. *Id.* at 62-63. Frankfurter also disregarded the tribe's permits for the trapsites from the Army Corps of Engineers and the Forest Service, arguing they merely indicated the traps did not violate the protective laws administered by those two agencies and had no bearing on the applicability of Alaska law. *Id.* at 63-64.

58. Frankfurter was similarly mysterious about this phrase in Metlakatla Indian Community v. Egan, 369 U.S. 45, 58-59 (1962). He first remarked that Alaska's "jurisdiction over fishing is subject" to the reserved federal power, then asserted that the reservation of power did not authorize the Secretary to license fish traps.

59. *Id.* at 65-66. *See* the Alaska Native Claims Settlement Act, Pub. L. 92-203, 85 Stat. 688 (1971), 43 U.S.C. 1601 *et seq.*

60. 369 U.S. 67 (1962).

61. *Id.* at 69.

62. *Id.* at 69-71.

63. *Id.* at 67-68.

64. *Id.* at 68 (emphasis added). He also reviewed much of Justice Black's historical argument, *id.* at 71-76.

65. The *Williams* rule applies "absent governing Acts of Congress," 358 U.S. 217, 220 (1959). The Arizona Enabling Act is a governing act of Congress. If raised in issue, it would have been controlling. The Arizona Enabling Act was referred to by the Court several years later in McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973), but only as a boilerplate citation for the proposition that "Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation." 411 U.S. 164, 175 (1973).

66. Justice Frankfurter well appreciated the significance of the Indian Reorganization Act. 369 U.S. 73 (1962).

67. *Id.*

68. The text of the statute is quite clear on this point. *See* State *ex rel.* Adams v. Superior Ct., 57 Wash. 2d 181, 356 P.2d 985 (1960).

69. The Secretary was also required to give preference in procurement to *Indian* contractors, 25 U.S.C. 47 (1970). Title I of the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203 (1975), 25 U.S.C. 450 (1975), has the effect of including tribes in the category of government agencies eligible to contract under 25 U.S.C. 452 (1970).

70. 72 Stat. 545 (1958), incorporating 67 Stat. 588 (1953).

71. 369 U.S. 74 (1962).

72. 358 U.S. 217, 220 (1959) (emphasis added).

73. 369 U.S. 75-76 (1962). He did cite Tulee v. Washington, 315 U.S. 681, 683 (1942), but that case's brief mention of off-reservation fishing was in a summary of the state's argument, not a ruling. See the discussion of *Tulee* in United States v. Washington, 384 F. Supp. 312, 336 (W.D. Wash. 1974). In Strom v. Comm'n, 6 T.C. 621, 627 (1946), *aff'd per curiam* 158 F.2d 520 (9th Cir. 1947), not discussed by Frankfurter, the court reasoned that a state tax on Indian fishermen's net income was not a burden on the right to fish—protected by treaty—but only on proceeds from the exercise of that right. Obviously, however, a tax on income from a good reduces its value to the possessor and discourages the possessor from exploiting it. After *Kake*, the Supreme Court did get around to expressly permitting state regulation of off-reservation fishing where that regulation is "reasonably necessary" for the survival of the species. Department of Game v. Puyallup Tribe, 44 U.S. 44 (1973); United States v. Washington, 384 F. Supp. 312, 337-39 (W.D. Wash. 1974).

74. Frankfurter insinuated that the state has a special interest here, "[b]ecause of the migratory habits of salmon." 369 U.S. 76 (1962). However, traps are always the terminal gear type, because they must be anchored in shallow estuarine and riparian waters. Salmon reaching traps have *already* passed the gauntlet of state-regulated marine gear; those that pass the traps spawn and die. Tribes operating traps have no interest in overfishing because to do so would decrease future runs and thereby devalue their traps. *See* Barsh, *The Washington Fishing Rights Controversy: An Economic Critique* (in press).

75. 369 U.S. 76 (1962) "Nor have appellants any fishing rights derived from federal laws." Although the determinative issue in the case, this remark is little more than an aside at the conclusion of Frankfurter's ruminations.

76. Both cases evoke a thinking-out-loud quality. Why did Frankfurter discuss Alaskan native status in *Metlakatla* when it was really applicable only to *Kake*? Why did he invoke "infringement" in *Metlakatla* where there were applicable federal laws, and not in *Kake* where there weren't any?

77. 380 U.S. 685 (1965).

78. *Id.* at 686.

79. *Id.* at 686-87, 690, *quoted in* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 168 (1973).

80. 380 U.S. 688-90 (1973). Worcester v. Georgia, 32 U.S. (6 Pet.) 515, 554 (1832), interpreted these regulations as being in the nature of foreign trade laws.

81. 25 C.F.R. 252; *cf.* 25 C.F.R. 251. The Court did not cite these regulations.

82. 380 U.S. 685, 690 (1965).

83. *See generally* Merrill, Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 139 (1973) and cases cited therein; Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960); Pennsylvania v. Nelson, 350 U.S. 497, 500, 502 (1956). The Warren Court cited Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), which is referred to approvingly in *Merrill, Lynch.*

84. In applying preemption elsewhere, the Court has not uncommonly examined the purposes of federal and state statutes to determine whether there is in fact any inconsistency of purpose. Merrill, Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973).

85. 380 U.S. 691 (1964). Antimonopoly and price-ceiling regulations would seem to be more appropriate means of insulating Indians from unfair prices. In fact, the licensed trading system itself is monopolistic and less rigorously controlled than off-reservation retailing. FTC, THE TRADING POST SYSTEM ON THE NAVAJO RESERVATION (June 1973).

86. This was actually untrue in 1965. See Arizona v. Hobby, 221 F.2d 408 (D.C. Cir. 1954); Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948); 64 Stat. 44 c. 92 (1950), 25 U.S.C. 639 (1975) *as amended.*

87. 411 U.S. 164 (1973), *rev'g* 14 Ariz. App. 454, 484 P.2d 223 (1971).

88. *Id.* at 165. Compare Black's language in *Williams* to the effect that reservations are a "part" of the states.

89. *Id.* at 166 n.3.

90. *Id.* at 167-68.

91. Following Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), and the Kansas Indians, 73 U.S. (5 Wall.) 737 (1867).

92. 411 U.S. 164, 170 (1973).

93. The Supreme Court of Arizona also read *Williams* and *Warren* to be inapplicable to state regulation of private activities, *id.* at 179.

94. United States v. Draper, 164 U.S. 240 (1896); Utah & Northern Ry. v. Fisher, 116 U.S. 28 (1885); New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946), all of questionable applicability as noted *supra. Id.* at 172.

95. *In re* Heff, 197 U.S. 488 (1905); Standing Bear v. Crook, 25 Fed. Cas. (C.C. Neb. 1879), (No. 14,891). *See also* Elk v. Wilkins, 112 U.S. 94, 119 (1884) (dissenting opinion per Harlan and Woods); Swift v. Leach, 178 N.D. 437, 438-39 (1920); Opsahl v. Johnson, 138 Minn. 42 (1917). *Cf.* United States v. Osborn, 2 F. 58 (D. Ore. 1880). The Supreme Court eventually resisted this tendency, *e.g.*, United States v. Nice, 241 U.S. 591 (1916), but the use of severance of tribal relationship as a legal criterion has never entirely disappeared, Morton v. Ruiz, 415 U.S. 199, 209 (1973).

96. 411 U.S. 164, 170 (1973).

97. *Id.* at 172 (emphasis added). At one point Marshall characterized tribes as *"once* independent and sovereign nations," *Id.* (emphasis added), and elsewhere as "*semi*-independent," *id.* at 173 (emphasis added). Thurgood Marshall obviously shared John Marshall's problems with labeling tribes' political status. *See* Cherokee Nation v. Georgia, 31 U.S. (5 Pet.) 1, 17-18 (1831).

98. 411 U.S. 164, 172 n.8 (1973).

99. 280 U.S. 363, 367 (1930).

100. 411 U.S. 164, 174-75 (1973).

101. *Id.* at 179.

102. *Id.* at 181 (emphasis added).

103. Marshall cited only one case for this sweeping generalization: Kake v. Egan, 369 U.S. 60 (1962), which at the beginning of his opinion, *id.* at 179, he said was *inapplicable* to the Navajos.

104. Marshall may have been thinking of conflicts of laws, where "interest tests" abound. In conflicts, however, although the discovery of another state's interest in a controversy may result in application of that state's substantive law, it does not ordinarily require a change in the forum.

105. 411 U.S. 145 (1973), *aff'g in part and rev'g in part* 83 N.M. 158, 489 P.2d 666 (1971).

106. 25 U.S.C. 465 (1975).

107. 25 U.S.C. 567 (1970).

108. 411 U.S. 146, 155 n.11 (1973). This was also true in Kake v. Egan, 369 U.S. 60 (1962).

109. 411 U.S. 146, 148 (1973).

110. *Id.* at 150. Where, then, does *Warren* fit in? In support of this generalization, *id.* at 154-55, White quoted at length from Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575, 578-81 (1928). *Shaw* actually based its conclusion that leaseholds in off-reservation trust lands are taxable on the theory that to "hold them immune would be inconsistent with one of the very purposes of their creation, to educate Indians in responsibility." In other words, although tax immunity may encourage Indian economic development, nonimmunity serves a *higher purpose* of teaching Indians their civic duty as taxpaying citizens! *Shaw* was therefore very much an instrumentality case, however unorthodox its interpretation of the nature of the federal purpose.

111. 411 U.S. 145, 150 (1973); McClanahan v. Arizona Tax Comm'n, 411 U.S. 168 (1973).

112. 411 U.S. 145, 149-50 (1973).

113. *Id.* at 151, *citing* Choctaw, Oklahoma & Gulf Ry. v. Mackey, 256 U.S. 531, 536 (1921).

114. 283 U.S. 279, 282 (1931). The same rule has been applied to state taxes on sales of property by the United States, United States v. City of Detroit, 355 U.S. 466, 469, 472 (1958).

115. The original case on this principle was, of course, McCulloch v. Maryland, 18 U.S. (4 Wheat.) 316 (1819), which involved state taxation of federal bank notes. State taxa-

tion of the use of a federal subsidy must frustrate federal policy just as much as state taxation of federal currency, although the latter has a more general or diffuse effect. The Court now takes the position that an activity, to be exempt, must be "virtually ... an arm of the Government," Department of Employment v. United States, 385 U.S. 355, 359-60 (1966). *See also* United States v. Boyd, 378 U.S. 39 (1964) (contractor's use of federal property subject to state tax).

116. 411 U.S. 154 (1973). Recall Frankfurter's contrary argument in *Metlakatla.*

117. *See, e.g., Hearing, To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise, Senate Comm. on Indian Affairs,* 73d Cong.. 2d Sess. (1934), at 31-32, 64, 70, 106, 151; *Hearing, Readjustment of Indian Affairs, House Comm. on Indian Affairs,* 73d Cong., 2d Sess. (1934), at 18, 20, 22, 23, 43, 48, 316; 78 CONG. REC. 11729 (June 15, 1934).

118. 25 C.F.R. subchapters K through Q. In addition, subchapters B, F, and G regulate tribal governing functions and subchapters H through J regulate tribal fiscal management.

119. *Id.*, subchapter W ("Miscellaneous"), subparts 251-52.

120. Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), *aff'g* 335 F. Supp. 1258 (N.M. 1971).

121. *Kake* had attached no significance whatsoever to the fact that the tribal activities there were conducted on sites acquired from the same agency, the United States Forest Service!

122. 25 U.S.C. 465 (1970).

123. Alpha Portland Cement Co. v. Commissioner, 268 U.S. 203 (1925); Cohn v. Graves, 300 U.S. 308 (1937).

124. Chouteau v. Burnet, 283 U.S. 691 (1931). The non-Indian lessee of trust land is also taxable by the state, Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949), with the result that the Indian lessor's income is indirectly taxed. These cases only superficially suggest a jurisdictional distinction based on race. The lessees were residents of the taxing state, not the reservation. By the rule of *Alpha Portland Cement* a state resident can be taxed by his own state on the proceeds of out-of-state land.

125. Leahy v. State Treasurer, 297 U.S. 420 (1936).

126. Squire v. Capoeman, 351 U.S. 1 (1956). *See also* Holt v. Commissioner, 364 F.2d 38 (8th Cir. 1966), *cert. denied,* 386 U.S. 931 (1967) (Sioux Indians' income from cattle grazed on tribal trust land subject to federal income tax) ; Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935) (income from reinvestment of tribal trust funds taxable by United States). I.R.S. REV. RUL. 67-284 provides that proceeds of trust land are tax exempt only if "directly" derived from the land itself.

127. In addition, because the United States pays for most reservation services, it can advance the stronger claim for indemnification through taxes.

128. 5 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 21, 38-39, 55, 64, 77 (1845).

129. The majority and dissent both agreed that Congress intended to foster tribal economic enterprise. The real issue was the extent to which tax immunities were implied in this general policy.

130. 351 U.S. 1 (1956).

131. Justice White included fixtures within the statutory tax exemption because they are "so intimately connected with the use of the land itself," 411 U.S. 145, 158 (1973). No cases, state or federal, were cited on this point.

132. *Id.* at 161.

133. United States v. McGowan, 302 U.S: 535 (1938); Perrin v. United States, 232 U.S. 478 (1914). Neither case is strictly in point for this sweeping principle. *McGowan* involved liquor sales within an executive-order reservation. In *Perrin* the tribe had stipulated in its treaty of cession that no liquor be sold within the ceded tract. Thus, in both cases, the particular situs remained under some degree of special residual, territorial federal control.

134. 411 U.S. 145, 155 (1973).

135. *Id.* at 162.

136. *Hearing, Emancipated Citizenship for Indians, House Comm. on Indian Affairs,* 71st Cong., 3d Sess. 17 (1931).

137. 419 U.S. 544 (1975), *rev'g* 487 F.2d 14 (10th Cir. 1973).

138. *Id.* at 546-50, 487 F.2d at 15-17.

139. 18 U.S.C. 1151, 1154(a),(c), 1161 (1970).

140. 487 F.2d 17-18 (10th Cir. 1973). Assignment of the burden of proof on this issue was hopelessly confused at trial. 419 U.S. 544, 549 n.8, 553 n.10 (1975) *rev'g* 487 F.2d 14 (10th Cir. 1973).

141. 368 U.S. 351, 358 (1962).

142. 487 F.2d 14, 18 (10th Cir. 1973).

143. The court buried this conclusion in an aside as if it were embarrassed by its own bootstrapping: "if the Government has the power to regulate a business on the land it granted in fee without restrictions, *which we doubt*, . . ."(emphasis mine). The lower court was transfixed on the idea that the Mazuries' original fee patent did not include language reserving jurisdiction to the tribe. But patents do not contain language reserving jurisdiction to states, either, and yet are subject to state law. The real question is who has jurisdiction of the place, not what the patent says.

144. Congress adopted a kind of demographic test of tribal jurisdiction in the Alaska Native Claims Settlement Act, 43 U.S.C. 1610(b)(2)(B) (1970). As currently administered, the reservation system forces educated and skilled Indians to choose between unemployment and self-government on their own land, or self-imposed but more profitable exile in urban areas.

145. 419 U.S. 544, 553 (1975).

146. 487 F.2d 14, 18 (10th Cir. 1973).

147. *Id.* at 19, citing *McClanahan* and *Mescalero*, which is difficult to understand. The court also cited *Iron Crow* for authority that tribal powers extend only to tribal members, as in a private association, but disregarded *Barta*, in which the same circuit recognized the same tribe's power to tax non-Indians. *Supra* note 26. The district court did admit that "certain tribes" have attributes of sovereignty. Astoundingly, the Wind River tribes did not submit an *amicus* brief to the Supreme Court to challenge these remarkable theories.

148. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Tenth Circuit did not cite these cases. *See also* United States v. Rock Royal Coop, 307 U.S. 533 (1939).

149. 419 U.S. 544, 553-56 (1975). There is no contrary Supreme Court authority.

150. *Id.* at 699, *citing* United States v. Curtiss Wright Export Corp., 299 U.S. 304, 319-22 (1936), which is not in point. *Curtiss-Wright* questioned the power of Congress to delegate foreign trade authority *to the President*, not to a state or local government or private body. If Rehnquist was assuming that tribes are, like the President, parts of the federal government itself, he ignored the contrary ruling of *Mescalero*.

151. *Id.* at 557, *citing Williams* and *McClanahan*. Many tribes have licensing powers enumerated in their constitutions. In a sample of 64 North Plains, Northwestern, and Basin tribes' constitutions, I found 31 that had such provisions.

152. 420 U.S. 425 (1975).

153. Mattz v. Arnett, 412 U.S. 481, 505 (1973), decided shortly after *McClanahan*. The power of Congress to terminate tribes without their consent has never been denied by the courts, although the scope of a particular termination act may be challenged. Menominee Tribe v. United States, 391 U.S. 404 (1968). *See also* United States v. Celestine, 215 U.S. 278, 285 (1909): "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."

154. For evidence of the tribe's willingness to part with its territory, the Court relied largely on statements of tribal members recorded by negotiators for the United States, 420 U.S. 425, 436 n.16 (1975), and reported in the *Minneapolis Tribune, id.* at 435 n.12—scarcely unbiased sources. The Court had evidence before it that the tribe was in a desperate state economically, which their "guardian," the United States, had failed to relieve. Rather than ask Congress for funds, the Interior Department, under pressure from non-Indian businessmen, persuaded the tribe to sell its reservation to finance essential services. *Id.* at 431 n.8. The tribes obviously had little choice in the matter. Approximately 72 per cent of the reservation was sold, the balance being allotted to individual tribal members. *Id.* at 436 n.16, 438 n.19.

155. *Id.* at 444-46. Remember that Stewart joined Douglas in chiding the majority in *McClanahan* for not applying the *Carpenter* rule to the facts there. The facts in *DeCouteau* must have struck Stewart as requiring too extreme an application of the principle of "liberal construction."

156. *Id.* at 449.

157. In his dissent, Douglas matched the majority's legislative history with reasonably persuasive evidence cutting the other way, *i.e.*, that Congress intended the sale to have no effect on tribal self-government. *Id.* at 461-64, n.2.

158. The tribe also provided services and maintained a system of courts and laws. Its 1964 constitution invoked jurisdiction over only "Indian-owned lands," a provision found in about one-fourth of all current tribal constitutions. In 1966 the Secretary of the Interior approved a new constitution conferring complete territorial jurisdiction. *Id.* at 443, 464-65, n.8. All but two of the other eleven tribes administered by the Bureau of Indian Affairs' Aberdeen Area Office already had such provisions. 1 & 2 Fay, *Charters, Constitutions and By-Laws of Indian Tribes of North America*, COLORADO STATE COLLEGE MUSEUM OF ANTHROPOLOGY, OCCASIONAL PAPERS IN ANTHROPOLOGY (1967).

159. 420 U.S. 425. 464 (1975), *citing Williams* and *McClanahan*, neither of which, however, actually include comparable language.

160. *Id.* at 456 (Article I).

161. *Id.* at 464-65 *Cf.* the majority's discussion at 445, n.33.

162. Quoted and discussed by Chief Justice John Marshall in *Foster*, and in Elam v. Neilson, 27 U.S. (2 Pet.) 253, 300 (1829) (emphasis added).

163. *E.g.*, 39 Stat. 988 (1917), and 42 Stat. 576 (1921), as well as annual appropriations for the Bureau of Indian Affairs.

164. 420 U.S. 425, 466-67 (1975).

165. My computation, based on the original area of the Lake Traverse Reservation. If all allotments had been made contiguous, the residual tribal perimeter would have been only about 57 miles.

166. *See* § 2(a)(2) of the Act, 88 Stat. 2203 (1975), 25 U.S.C. 450 (1975).

167. —U.S.—, 96 S.Ct. 943 (1976).

168. *Id.*, 96 S.Ct. at 946-47. Northern Cheyenne is not a Public Law 280 reservation.

169. *Id.* at 946. *Fisher* therefore implicitly overrules *Draper*. But *Fisher* relies on *Kake*, which itself purported to rely on *Draper*! The conclusion is the converse of one of the premises.

170. Montana had acquired this jurisdiction, of course, via *Draper*, which was approvingly cited by the Court in *Williams, Kake*, and *McClanahan*.

171. The power of tribes to tax non-Indians was upheld in Oglala Sioux Tribe v. Barta, 146 F. Supp. 917 (S.D. 1956); Buster v. Wright, 135 F. 947 (8th Cir. 1905). Whether this power is concurrent or exclusive was not resolved.

172. —U.S.—, 96 S.Ct. 943, 948 (1976).

173. 417 U.S. 535, 551-55 (1974). *Morton* reasoned that the Indian preference rule governing Bureau of Indian Affairs hiring is not racial but political in nature; since the Bureau governs Indians, the Court reasoned, requiring employees to be Indians wherever possible is like a residency requirement for state office.

174. Burnet v. Harmel, 287 U.S. 103, 110 (1932).

175. Commissioner v. Hausen, 360 U.S. 446 (1959); Commissioner v. Court Holding, 324 U.S. 331 (1945); Gregory v. Helvering, 293 U.S. 465 (1935); Cubic Corp. v. United States, 74-2 T.C. 9967 (S.D. Cal. 1974). Similarly, the "economic interest" test for distinguishing between leases and sales for federal tax purposes, Palmer v. Bender, 287 U.S. 551 (1933); Vest v. C.I.R., 481 F.2d 238 (5th Cir. 1973); Wood v. United States, 377 F.2d 300 (5th Cir. 1967). *See also* Resorts Int'l v. C.I.R., 511 F.2d 107 (5th Cir. 1975) (sale versus license, "proprietary right" rule). *Cf.* Central Oil & Supply Corp. v. United States, 75-1 T.C. 16184 (W.D. La. 1975) (sale versus consignment, referred to state law).

176. 392 F. Supp. 1297, 1308 (1975), *quoting from* R.C.M. 84-5606 (1). The court referred to this statute as the "factual background" of the case.

177. Mary Ellen McCaffree, "Who Must Pay to Puff?" Address to the Western States Association of Tax Administrators, Sept. 23, 1975 (Offprint by State of Washington, Department of Revenue).

178. Retention will therefore be a function of the remoteness of reservations from populated areas. The more costly it is for consumers to patronize a reservation retailer, the less they will be willing to pay for the same goods. I would predict a lower retention in Montana, for instance, than on the western Washington reservations ringing Seattle.

179. 392 F. Supp. 1297, 1308 (1975).

180. *Id.* at 1311. The applicability of state cigarette sales taxes to Indian consumers was never seriously disputed. Montana assumed criminal and limited civil jurisdiction under Pub. L. 280, but the district court concluded that taxation is neither criminal in nature nor implied in Montana's Pub. L. 280 jurisdiction over schools, public welfare, domestic relations, mental health, or traffic. *Id.* at 1306, 1317. In other words, the power to tax is not implied in the power to serve. *Compare* Tonasket v. State, 84 Wash. 2d 164, 525 P.2d 744 (1974), which relied on, of all things *Kake* and *Draper* to reach the opposite rule. *See also* Mahoney v. Idaho Tax Comm'n, 96 Idaho 59, 524 P.2d 187, *cert. denied*, 419 U.S. 1089 (1974).

181. *See* Rockbridge v. Lincoln, 449 F.2d 567 (C.A. Ariz. 1971). The currently applicable statutes are 25 U.S.C. 261-62 (1970).

182. *See especially* the Indian Financing Act, Pub. L. 93262, 88 Stat. 77 (1974), 25 U.S.C. 1451-1553 (1974 Supp.); § 10 of the Indian Reorganization Act, 48 Stat. 986 (1934), *as amended* 25 U.S.C. 470 (1970).

183. 392 F. Supp. 1297, 1311 (1975) (emphasis added). This notion is repeated in substance at 1317.

184. *Id.* at 1311, 1317.

185. *Id.* at 1314 n.9, 1314-15.

186. 20 U.S.C. 236 *et seq.*, 631 *et seq.* (1958). Commonly referred to as "Public Law 874," it provides state districts with 100 per cent of the federally estimated "per pupil cost" of children whose parents live and work on a federal reservation.

187. 25 U.S.C. 452 (1970).

188. 20 U.S.C. 241a; 20 U.S.C. 241aa-241ff (1970).

189. NAACP LEGAL DEFENSE & EDUC. FUND, AN EVEN CHANCE: A REPORT ON FEDERAL FUNDS FOR INDIAN CHILDREN IN PUBLIC SCHOOL DISTRICTS (1971).

190. LEVITAN & JOHNSON, INDIAN GIVING. FEDERAL PROGRAMS FOR NATIVE AMERICANS 41 (1975). This study was commissioned by the Ford Foundation.

191. *Id.* Montana attributed $356,735 to "impact" aid for Flathead, 392 F. Supp. 1297, 1314 (1975), but receives $1.1 million statewide from Johnson-O'Malley alone. *Hearing, Department of the Interior and Related Agencies Appropriations Fiscal Year 1976, Senate Comm. on Appropriations*, 94th Cong., 1st Sess. 892-93 (1975). This works out to $186 per Indian pupil or about $105,000 for Flathead.

192. The district court seemed aware of this, 392 F. Supp. 1297, 1314 n.9 (1975).

193. *E.g.*, Act of June 4, 1920, 41 Stat. 756, 516 (Crow).

194. 392 F. Supp. 1297, 1313 n.2 (1975). This is unusually high. Fort Peck is comparable with 65 per cent, but the other five Montana reservations are probably less than 10 per cent non-Indian residents. ECONOMIC DEVELOPMENT ADMINISTRATION, FEDERAL AND STATE INDIAN RESERVATIONS (1971).

195. 392 F. Supp. 1297, 1313 (1975).

196. *Id.* at 1314.

197. *Id.* at 1315-16.

198. *Id.* at 1319, 1323-24.

199. Implying, of course, that it involves a "compelling" national interest. *Id.* at 1315-16, 1321. Similarly, Fisher v. District Ct.,—U.S.—, 96 S.Ct. 943, 948 (1976); Morton v. Mancari, 417 U.S. 535, 552 (1974).

200. 392 F. Supp. 1297, 1319-20 (1975).

201. From time to time, state representatives have gone on record to support this alternative, *e.g.*, *Hearing, Readjustment of Indian Affairs, supra* note 17, at 173-75.

202. —U.S.—, 96 S.Ct. 1634, 1639-42, (1976).

203. This issue was not raised in *McClanahan*.

204. 392 F. Supp. 1297, 1303 (1975), *quoting from* Department of Employment v. United States, 385 U.S. 355, 358 (1966) (emphasis added).

205. Heckman v. United States, 224 U.S. 413 (1912); United States v. Rickert, 188 U.S. 432 (1903).

206. —U.S.—, 96 S.Ct. 1634, 1641-42 (1976). The Report merely said that § 1362 would provide "the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attornies."

207. *Id.* at 1640.

208. *Id.* at 1641 n.13.

209. *Id.* at 1640-41, especially n.13. *Cf.* Cady v. Morton 527 F.2d 786 (9th Cir. 1975) *and* Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), holding that a tribe *is* a federal instrumentality for the purposes of applying the National Environmental Protection Act.

210. —U.S.—, 96 S.Ct. 1634, 1642-43 (1976).

211. Consistent with *Mazurie*, however, Rehnquist rejected the state's contention that allotment of the reservation had the effect of checkerboarding tribal jurisdiction. *Id.* at 1643-44, *citing* Mattz v. Arnett, 412 U.S. 481, 491 (1973), United States v. Mazurie, 419 U.S. 544, 554-55 (1975), and Seymour v. Superintendent, 368 U.S. 351, 358 (1962) ("impractical pattern of checkerboard jurisdiction" contrary to federal purpose in creating reservations). Similarly, the district court in *Moe* declined to extend *DeCouteau* to the Flathead situation.

212. —U.S.—, 96 S.Ct. 1634, 1645 (1976), where he says the *fact* that the burden falls on the consumer "necessarily follows" for the *wording* of the statute. Four years earlier the Court held that a Connecticut sales tax is borne entirely by purchasers, relying entirely on the fact that Connecticut law required stores to ring the tax up separately. Sullivan v. United States, 395 U.S. 169, 171 (1969). Cigarette taxes are included in the shelf price of the goods. Is the *Sullivan* rule reconcilable with *Moe*?

213. —U.S.— 96 S.Ct. 1634, 1645 (1976) (emphasis is the Court's).

214. *See also* Kennerly v. District Ct., 400 U.S. 423 (1971); State *ex rel.* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969); Blackwolf v. District Ct., 493 P.2d 1293 (Mont. 1972); Crow Tribe v. Deernose, 487 P.2d 1133 (Mont. 1971).

215. —U.S.—, 96 S.Ct. 1634, 1646 (1976).

216. 392 F. Supp. 1297, 1311 (1975). The Supreme Court declined to rule on this matter. —U.S.—, 96 S.Ct. 1638-39 n.6 (1976).

217. *E.g.*, Reder, *Citizen's Rights and the Cost of Law Enforcement*, 3 J. OF LEGAL STUDIES 435 (1974).

218. Buster v. Wright, 135 F. 947 (8th Cir. 1905), *app. dismissed*, 203 U.S. 599 (1906); Maxey v. Wright, 105 F. 1003 (8th Cir. 1900); Oglala Sioux Tribe v. Barta, 146 F. Supp. 917 (S.D. 1956)

219. *See, e.g.* Quechan Tribe v. Rowe, 531 F.2d 408, 411 n.4 (9th Cir. 1976).

220. Act of June 30, 1947, 61 Stat. 644 *as amended* 4 U.S.C. 104-10 (1970).

221. 4 U.S.C. 104 (1970).

222. 4 U.S.C. 105 (1973, Supp. III).

223. 4 U.S.C. 106 (1970).

224. 4 U.S.C. 107 (1970).

225. 4 U.S.C. 109 (1970).

226. 4 U.S.C. 110(e) (1970). Mysteriously, 4 U.S.C. 104 refers to "military or other reservations," nowhere defined, rather than "Federal Area," which is defined.

227. § 7, 48 Stat. 986 (1934), 25 U.S.C. 467 (1970); also the first paragraph of § 5, 25 U.S.C. 465. *See* United States v. Kagama, 118 U.S. 375, 383 (1886) (reservations "set apart within the state for the residence of the tribe").

228. The only general provision for taking title in trust for tribes is 25 U.S.C. 465 (1970), but there are numerous references in acts passed for individual tribes, 25 U.S.C. 465a, 488, 489, 501, 574, 608a, 621-22, 624(d), 640d-9 (1970).

229. United States v. Mason, 412 U.S. 391, 398 (1973); Chippewa Indians v. United States, 301 U.S. 358 (1937); United States v. Creek Nation, 295 U.S. 103 (1935).

230. 25 U.S.C. 397 (1970), lands "bought and paid for" by Indians. *See* Strawberry Valley Cattle Co. v. Chipman, 13 Utah 454, 45 P. 348 (1896).

231. Art. I § 8 cl. 17.

232. Art. IV § 3 cl. 2.

233. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558 -59 (1832). *See also* United States v. Mazurie, 419 U.S. 544, 551 (1975), and cases cited in note 2, *supra.*

234. United States v. Kagama, 118 U.S. 375 (1886). *But cf.* FPC v. Tuscarora Indian Nation, 362 U.S. 99, 113 (1962).

235. The Buck Act presumably excludes the territories and insular possessions because its application is to Federal Areas "within" states.

236. Pub. L. 85-159, 71 Stat. 401 (1957).

237. FPC v. Tuscarora Indian Nation, 362 U.S. 99, 110 (1962).

238. 4 Stat. 115 (1825), *as amended* 18 U.S.C. 7 and 13 (1970).

239. James Buchanan, *quoted in* Williams v. United States, 327 U.S. 711, 720-21 (1946).

240. 42 CONG. REC. 1193-94 (Jan. 28, 1908). Lower federal courts twice held the Act inapplicable to Indian reservations. United States v. King, 81 F. 625 (D.C. Wis. 1897); United States v. Barnaby, 51 F. 20 (C.C. Mont. 1892). Both involved crimes committed by and against Indians and, interestingly, both courts said that extension of the Act to such cases would infringe upon tribal self-government. In 1946, the Supreme Court went the other way in the case of a non-Indian defendant and *stipulated* that Indian reservations are set aside "for the exclusive use of the United States." Williams v. United States, 327 U.S. 711, 713 (1946), followed without discussion in United States v. Sosseur, 181 F.2d 873, 874 (7th Cir. 1950). The issue still seems open. Special federal criminal jurisdiction over reservation Indians is provided by 18 U.S.C. 1152, which incorporates all "general" federal criminal laws and post-dates the Assimilative Crimes Act, 4 Stat. 773 c.161 § 25 (1834), but whether the Assimilative Crimes Act is a "general" criminal law is unclear.

241. *Hearing, Application of State Sales and Use Taxes to Transactions in Federal Areas, Senate Comm. on Finance*, 76th Cong., 3d Sess. (1940).

242. *Id.* at 2, 11-12, 18-19.

243. *Id.* at 2, 18-19, 37; 84 CONG. REC. 10907 (Aug. 3, 1939).

244. *Hearing, supra* note 241, at 18. The governor of New Mexico told Senator Buck that the LaFollette amendment, by comparison, "practically nullifies the purpose of your bill insofar as New Mexico is concerned." *Id.* at 2, 6.

245. *Id.* at 38-39; 84 CONG. REC. 10685 (Aug. 2, 1939).

246. *Hearing, supra* note 241, at 12.

247. *Id.* at 18-19, 22.

248. *Id.* at 23-37, 47.

249. *Id.* at 6, 13, 29, 35.

250. Standard Oil Co. v. Johnson, 316 U.S. 481 (1942), adopted this view between the time of these hearings and the eventual passage of the Buck Act in 1947. *Cf.* Collins v. Yosemite Park Co., 304 U.S. 518, 528-29, 530, 534-36 (1938); Surplus Trading Co. v. Cook, 281 U.S. 647 (1930). In *Collins*, the state reserved its power of taxation when it ceded the park land to the United States.

251. Similarly, military property leased to a private contractor loses its tax-exempt status. United States v. Boyd, 378 U.S. 39 (1964).

252. 380 U.S. 690 n.18 (1964).

253. 411 U.S. 176, 177 (1973).

254. In fact, some supporters were concerned lest the Buck Act imply the existence of state jurisdiction over federal areas. *Hearing, supra* note 241, at 24.

255. 25 U.S.C. 319, 321 (1970).

256. 25 U.S.C. 312, 320 (1970).

257. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867), described reservations as sovereign territories, while United States v. Rickert, 188 U.S. 432 (1903), was an instrumentality case dealing with state taxation of individual Indian allotments.

258. 25 U.S.C. 398 (1970).

259. 25 U.S.C. 398c. After the Act of Mar. 3, 1871, *as amended* 25 U.S.C. 71 (1970), forbade the further making of treaties with tribes, reservations could only be established by act of Congress or by Executive Order.

260. 25 U.S.C. 406; 407 (1970). *See also* 25 U.S.C. 466, 403b, 415, 416 (1970).

261. WHITE, TAXING THOSE THEY FOUND HERE (1972) includes a detailed review of the pre-*Williams* tax cases.

262. 25 U.S.C. 465 (1970). *See also* 25 U.S.C. 1466, added in 1973. Taking "in trust" has become synonymous with tax exemption in administrative practice and congressional draftsmanship.

263. 49 Stat. 1967 (1936), *as amended* 25 U.S.C 501 *et seq.* (1970).

264. 25 U.S.C. 608(c) (1970) (Yakima). *But cf.* 25 U.S.C. 487(c) (Spokane), 574 (Shoshone), and 610b (Swinomish) (1970).

265. 25 U.S.C. 357 (1970).

266. 25 U.S.C. 375 (Five Civilized Tribes), 564(h) (Klamath), 697(b) (Oregon Tribes), 747 (Paiutes), 797 (Wyandotte), 843(b) (Ottawa) (1970). *Cf.* 25 U.S.C. 416i(b) (1970). *See also* 25 U.S.C. 348 (1970), regarding extension of state jurisdiction to allottees *in personam* after issuance of a fee patent.

267. Hopi, 25 U.S.C. 642(b) (1970). *See also* 25 U.S.C 491 (1970) (mortgages to secure F.H.A. loans) and 695(d) (1970) (trustees for Oregon tribes and Paiute asset distributions to be appointed consistent with state law).

268. 25 U.S.C. 1407 (1975).

269. 25 U.S.C. The following sections appear in either the 1970 or 1975 editions: 565f (Klamath), 589, 590c (Shoshone), 594 (Chippewa), 609a, 609b-1 (Yakima), 648 (Hualapai), 662 (California), 676a, 677p (Ute), 690 (Red Lake), 749 (Paiute), 788b, 788f (Creek), 798 (Wyandotte), 853(b) (Ottawa), 876 (Otoe), 881 (Potawatomi), 882a (Sac & Fox), 883c (Osage), 912 (Quapaw), 937 (Catawba), 955 (Agua Caliente), 963, 967c (Omaha), 978 (Ponca), 994 (Cherokee), 1013 (Snake), 1036 (Shawnee), 1058 (Tillamook), 1071, 1073 (Colville), 1087 (Quileute), 1104 (Nooksack), 1120, 1129 (Miami), 1124 (Duwamish), 1146 (Emigrant N.Y. Indians), 1154 (Chehalis), 1165 (Cheyenne-Arapaho), 1171 (Iowa), 1185 (Delaware), 1194 (Umatilla), 1204 (Sioux), 1211 (Tlingit & Haida), 1225 (Confederated Weas,, Piankeshaws), 1234 (Chemehevi), 1246 (Pembina Chippewa), 1252 (Flathead), 1273 (Jicarilla), 1282 (Havasupai), 1296 (Delaware), 1300a-3 (Yavapai). 1300b -4 (Kickapoo), 1300c-4 (Yangton Sioux), 1300d-8 (Mississippi Sioux), 1300e-6 (Assiniboine). *See also* 25 U.S.C. 903d(c) (1970) (transfer of assets, Memominee restoration).

270. 25 U.S.C. 674 (1970) (Ute Mountain), 683, 686, 689 (1970) (Chippewa), 772 (1970) (Oregon Indians).

271. 25 U.S.C. 572 (1970) (Shoshone), 656, 658 (1970) (California Indians), 894 (1970) (Menominee).

272. 25 U.S.C. 564c, 564j (1970) (Klamath), 898 (1970) (Menominee), 1264 (1975) (Blackfeet).

273. Even the General Allotment Act addresses taxation obliquely. Instead of simply saying that allotments are tax -exempt, it directs the Secretary of the Interior to convey fee patents to allottees, *at the end* of the trust period, "free of all charge or incumbrance," 25 U.S.C. 348 (1970), and with "all restrictions as to . . . taxation . . . removed," 25 U.S.C. 349 (1970). The Court read this to imply that allotments were intended to be tax-free in the first place. Squire v. Capoeman, 351 U.S. 1 (1956); United States v. Rickert, 188 U.S. 432 (1903).

274. THE FEDERALIST No. 30 (A. Hamilton).

275. BREAK, INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES (1967); OATES, FISCAL FEDERALISM (1972).

276. Answered by Hamilton in THE FEDERALIST No. 30. *See* Lee, *Observations of the System of Government proposed by the late Convention* (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 277 (Ford ed. 1888).

277. *See, e.g.*, Steiner, *"The Public Sector and the Public Interest,"* in HAVEMAN & MARGOLIS, EDS., PUBLIC EXPENDITURES AND POLICY ANALYSIS 21 (1970).

278. The availability of class actions mitigates this problem.

279. *See* Boyle, "Revenue Alternatives for the Navajo Nation; A Report to the Regents and President of Navajo Community College," Oct. 1973.

280. *Moe* affirmed the immunity of reservation *Indians* and their income from state taxes, but what about goods produced on-reservation and shipped off-reservation to non-Indians, as nearly all will be? This will prove the major problem for economic development.

281. *See generally* Barsh & Henderson, *Tribal Administration of Natural Resource Development*, 52 N.D.L. REV. 307 (1975).

282. I have argued elsewhere that this happened in the northern tier coal contracts with tribes. Barsh, *Corporations and Indians: Who's the Villain?* MBA (June 1975). Also, reservations have no unions (some, such as Navajo, prohibit unionization) and reservation labor is often secured by contract with the tribe, hence, the ability of industry to procure favorably low wage rates.

283. *Hearing, supra* note 241, at 8.

284. *Id.* at 22.

285. And less than 5 per cent of its revenue from cigarette taxes alone. State of Washington, *Budget. 1975-1977 Biennium* II:645, (1975) State of Washington, Department of Revenue, *Third Biennial Report* 9, 15 (1972).

286. *Hearings, Menominee Restoration Act, House Comm. on Interior & Insular Affairs, Subcomm. on Indian Affairs*, 93d Cong., 1st Sess. (1972).

287. 25 U.S.C. 1452(e) (1975), defines an "Indian" company as one with 51 per cent or more Indian ownership.

288. There was some speculation that *Moe* would actually benefit Indian mining industries in the northern tier, based upon the Court's apparent affirmance of the principle that sales to Indians are tax-exempt. However, state taxation of reservation coal and oil arises from a specific statutory grant by Congress, 25 U.S.C. 398 (1970), and has not been modified by *Moe*.

289. Estimated from data in Washington State Planning and Community Affairs Agency, NONWHITE RACES, STATE OF WASHINGTON 186 (1968), and ECONOMIC DEVELOPMENT ADMINISTRATION, FEDERAL AND STATE INDIAN RESERVATIONS (1971).

290. Reported tribal income was $5.3 million in 1971, FEDERAL AND STATE INDIAN RESERVATIONS, *supra*, and could be very nearly twice that amount at this time.

291. McCaffree, "Who Must Pay to Puff?" *supra* note 177.

292. State of Washington, *Budget. 1975-1977 Biennium* II:645 (1975). I have not included cigarette taxes because the state assumes reservations have domestic sources of untaxed supply. *See also* State of Washington, Department of Revenue, *Third Biennial Report* 15 (1972); State of Washington, Department of Revenue, *Annual Report* 7 (1971); State of Washington, Department of Revenue, *Revenue Forecast for the State of Washington 1975-1977 Biennium* 17 (Jan. 1976).

293. See note 289 *supra*.

294. FEDERAL AND STATE INDIAN RESERVATIONS, *supra* note 289; Bureau of the Census, *1970 Census of Population, General Population Characteristics, Washington* 49-15, 49-96, 49-350.

295. State of Washington, Auditor, *Local Government Comparative Statistics* (1974).

296. 25 U.S.C. 1321(b) (1970), 1322(b) (1970). This understandably discourages states from assuming jurisdiction. *See,e.g.*, South Dakota State Legislative Research Council, *Jurisdiction over Indian Country in South Dakota* (1964).

297. State of Washington, *Budget, 1975-1977 Biennium* II:647 (1975).

298. *See* LEVITAN & JOHNSON. INDIAN GIVING, *supra* note 190, at 20, table 8. The state of Washington claims that its fishery enhancement programs directly benefit area tribes, who are co-tenants in the fishery under United States v. Washington, 384 F. Supp. 312 (Wash. 1974). Whether the share of the state's fisheries investments inuring to tribal fishermen is a net gain or merely compensatory for past injuries is a matter now before the district court.

299. Washington has only one budget line item specifically for Indians, its Indian Employment Assistance Program. At $1.5 million, it is .03 per cent of the current budget. State of Washington, *Budget. 1975-1977 Biennium* I:33 (1975).

300. *Id.* at I:254, 388, 422; II:745. In McClanahan v. Arizona Tax Comm'n, 411 U.S. 173 n.12 (1973), the Court noted that 80 per cent of Arizona's Social Security financing for Indians is federal. In *Moe*, the Court commented that 75 per cent of the funds for Montana's A.F.D.C. program for Indians are federal, — U.S. —, 96 S.Ct. 1313 n.5 (1976).

301. If reservation Indians in Washington paid all state taxes *and* had the same income as non-Indians, they would, because of their large landholdings, pay for *more* than their share of state services: $11 million.

302. LEVITAN & JOHNSON, INDIAN GIVING, *supra* note 190, at 20, table 8. I have apportioned the national figures to Washington as the ratio of Washington tribal members to all tribal Indians subject to federal supervision. Kent & Johnson, "Flows of Funds on the Yankton Sioux Indian Reservation," 9th Dist. Federal Res. Bank, Minneapolis (June 1976), demonstrate the extent of the impact of federal Indian affairs programs on bordering areas.

303. This method of raising taxes was proposed by statesmen anxious to reconcile the American colonies with Great Britain. MACPHERSON, THE RIGHTS OF GREAT BRITAIN ASSERTED AGAINST THE CLAIMS OF AMERICA, 52-56 (London 1776).

304. State of Washington, Department of Revenue, *Comparative State ocal Taxes* 1974 xi-xii (1975).

305. State of Washington, Department of Revenue, *Annual Report* 22 (1971); State of Washington, Department of Revenue, *Revenue Forecast for the State of Washington 1975-1977 Biennium* 16 (Jan. 1976).

306. Art. I § 10 cl. 2. In 1972 Washington tried to improve enforcement of its cigarette taxes by making the shipper liable for the tax as soon as the goods enter the state. Laws 1972 c. 157. Formerly only the in-state wholesaler was liable for the tax.

307. *Hearing, State Tobacco-Tax Collections, House Comm. on Ways & Means*, 80th Cong., 2d Sess. 1 (1948).

308. Both must be levied together to avoid having a discriminatory tax limited to cigarettes brought into the state in interstate commerce. *See* Austin v. New Hampshire, --U.S.—, 95 S.Ct. 1191 (1975).

309. *Hearing, State Tobacco-Tax Collections, supra* note 307, at 8, 12, 17, 44, 95. State tax administrators joined in heaping abuse on the mail order houses, calling them "bootleggers" and "racketeers," bringing about a "creeping paralysis" of "disrespect for law and for the obligations of citizenship," but the actual effect on state tax revenue was disputed. Individual states complained of losing from 3-10 per cent of their potential cigarette tax yields; the National Association of Tobacco Distributors claimed a 15-20 per cent loss nationwide. *Id.* at 7, 11, 20, 29, 32, 36, 37, 42, 67, 69-70, 92-93, 96. One congressman confidently placed the nationwide loss at not less than $750 million, but that happened to be three times the total cigarette tax collections of all of the states in 1946, and is completely fanciful.

310. It is difficult to read the 1948 hearings without suspecting this. Nearly all of the state representatives accused the mail order cigarette business of "unfair competition" with wholesalers and retailers located within the taxing states. Tobacco industry spokesmen echoed the same complaint, presenting themselves as "law-abiding" distributors "penalized merely because they are located in the state which imposes a cigarette tax." *Id.* at 10, 16, 20-21, 31-32, 70-72, 94, 96. Compare gasoline distributors' comments in *Hearing, Application of State Sales and Use Taxes, supra* note 241, at 21.

311. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 -29 (1819).

312. *Id.* at 425.

313. *Id.* at 426-27, 431.

314. Dobbins v. Erie Co., 41 U.S. (16 Pet.) 435 (1842) (federal employees); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (federal banks). *See also* THE FEDERALIST No. 7 (A. Hamilton).

315. In *The Federalist* No. 30, Hamilton argued that the federal power to tax does not prevent the states from taxing also, but obviously, at the limit, the supremacy clause can be invoked for a superior lien on the last dollar of every tax debtor. The states can only tax what the United States chooses not to tax.

316. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 439 (1827). *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

317. 25 U.S. (12 Wheat.) 419, 439 (1827).

318. Philadelphia & Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 284, 293 (1872).

319. 25 U.S. (12 Wheat.) 419, 441 (1827).

320. 17 U.S. (4 Wheat.) 316, 430 (1819).

321. 25 U.S. (12 Wheat.) 419, 441-42, 443 (1827).

322. The Court concluded that its rule must stand upon the question, "Upon what did the burden really rest?—not upon the question from whom the state exacted payment into

its treasury." Philadelphia & Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232, 272 (1872). It also distinguished between user charges ("tolls") and taxes, reasoning that states have a right to recoup their highway costs from shippers, but not to tax the value of the goods shipped. *Id.* at 277-78.

323. Coe v. Errol, 116 U.S. 517, 527 (1886).

324. United Airlines v. Mahin, 410 U.S. 623 (1973); Edelman v. Boeing Air Transport, 289 U.S. 249 (1933).

325. Philadelphia & Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232 282 (1872).

326. Due process requires that the law be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." Lanetta v. New Jersey, 306 U.S. 451, 453 (1938); Connally v. General Constr. Co., 269 U.S. 385, 391 (1925). This principle is familiar from cases in which a statute is challenged for vagueness. May it be applied with equal good reason to a judicial rule?

327. Barsh & Henderson, *Oyate Kin Hoye Keyuga u pe*, HARV. L. SCHOOL BULL. (Apr. 1974).